United States Court of Appeals

for the Second Circuit

APPENDIX

76-7348

United States Court of Appeals

For the Second Circuit

B

P/S

BOSTON M. CHANCE, LOUIS C. MERCADO, *et al.*,
Plaintiffs-Appellees,

against

THE BOARD OF EXAMINERS,
Defendant-Appellant,

and

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK
and THE CHANCELLOR OF THE CITY SCHOOL DISTRICT,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

UNITED STATES COURT OF APPEALS
FILED
OCT 6 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

JOINT APPENDIX

VOLUME I, PART A
(Pages 1a to 315a)

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PAGINATION AS IN ORIGINAL COPY

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Docket Entries

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

D. C. Form No. 106 Rev.

JUDGE [redacted] 2a JUDGE [redacted]

7C CIV. 4141

JUDGE POLLACK

TITLE OF CASE

CLASS ACTION

BOSTON M. CHANCE and LOUIS C. MERCADO, individually on behalf of all others similarly situated,

v.

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK:
GERTRUDE E. UNSER, individually and in her capacity as Chairman of the Board of Examiners;
JAY E. GREENE, MURRAY ROCHANITZ and PAUL DENN, individually and in their capacities as members of the Board of Examiners;
MURRY BERGTRAUM, individually and in his capacity as President of the Board of Education;
ISAIAH E. ROBINSON, JR., individually and in his capacity as Vice-President of the Board of Education;
MARY E. MEADE, SEYMOUR P. LACHMAN, and JOSEPH MONSERRAT, individually and in their capacities as members of the Board of Education;
HARVEY B. SCRIBNER, individually and in his capacity as Chancellor of the City School District of the City of New York; and THEODORE H. LANG, individually and in his capacity as Deputy Superintendent of Schools of the City of New York.

ATTORNEYS

For plaintiff:
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[redacted]

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed x	Clerk				
J.S. 6 mailed	Marshal				
Basis of Action: Violation CIVIL RIGHTS.	Docket fee				
$	Witness fees				
Action arose at:	Depositions				
		3/3/75	Cash	5	
		3/4/75	[illegible]		5
		4/7/75	Cash Com. Ct.	5	
		5/5/75	[illegible]		5

OK mb

UNITED STATES DISTRICT COURT

Jury demand date:

70 CIV. 414

D. C. Form No. 106 Rev.

JUDGE [redacted] JUDGE POLLACK

TITLE OF CASE — CLASS ACTION

BOSTON M. CHANCE and LOUIS C. MERCADO, individually on behalf of all others similarly situated,

v.

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK: GERTRUDE E. UNSER, individually and in her capacity as Chairman of the Board of Examiners; JAY E. GREENE, MURRAY ROCKAWITZ and PAUL DENN, individually and in their capacities as members of the Board of Examiners; MURRY BERGTRAUM, individually and in his capacity as President of the Board of Education; ISAIAH E. ROBINSON, JR., individually and in his capacity as Vice-President of the Board of Education; MARY E. MEADE, SEYMOUR P. LACHMAN, and JOSEPH MONSERRAT, individually and in their capacities as members of the Board of Education; HARVEY B. SCRIBNER, individually and in his capacity as Chancellor of the City School District of the City of New York; and THEODORE H. LANG, individually and in his capacity as Deputy Superintendent of Schools of the City of New York.

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STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DIS
J.S. 5 mailed x	Clerk				
J.S. 6 mailed	Marshal				5 —
Basis of Action: Violation CIVIL RIGHTS.	Docket fee				
$	Witness fees				
Action arose at:	Depositions	3/3/75	Frankel	5 —	5 —
		3/21/75	Cop. Corp. N.Y.	5 —	

BRUCE M. CHANCE, etc. vs. Board of Examiners, Board of Education City of New York, et al

JUDGE PUBLACK

DATE	4a PROCEEDINGS	Da...
Sep.24/70	Filed Complaint and issued summons.	
Sep.24,70	Filed pltffs Notice of Motion. Re; Prel. Inj. Ret. 10-6-70	
Sept.24-70	Filed Request and Order designating Ann Wallman to serve summons and complaint. So ordered. Clerk.	
Sept.24-70	Filed Summons - copies accepted.	
Oct.5-70	Filed Order to show cause re: Intervene Ret. 10/6/70.	
Oct.13-70	Filed Amended Complaint.	
Oct.26-70	Filed Affidavit of Arnold Webb and Exhibit, in support of motion for pre.inj.	
Oct.26-70	Filed Supplemental Memorandum of Points and Authorities in support of motion for pre.inj.	
Oct.26-70	Filed OPINION #37146. Mansfield, J. The motion to intervene is denied. It is so ordered. (mailed notice)	
Nov. 1,70	Filed Order that pending the determination of this motion, the defts are restrained from promoting, or otherwise participating any non eligible list for supervisory service positions in the New York City school system as indicated. Mansfield J.-(mailed notice.	
Dec.14-70	Filed Notice of Motion re: Allow Class Action. Ret. 12/29/70.	
Dec.14-70	Filed Memorandum of Points and Authorities in support of pltfs', motion to allow class action.	
Dec.30-70	Filed Notice of Settlement and Order. Ordered that the Board of Examiners shall prepare two lists of the candidates for the supervisory examinations listed on Exhibit A, etc. and a copy of the name and address list shall be served by hand upon counsel for the board of Education, etc. Information concerning the ethnicity of individuals obtained pur. to this order is to be used solely for the purpose of tabulating the pass-fail statistics requested by the Court in the present action, etc. So ordered. Mansfield, J. (mailed notice).	
Dec.31-70	Filed 3 Envelopes ordered to be sealed and impounded pur. to order of 12/30/70 and Placed in Vault Room 602.	
Jan.18-71	Filed two (2) Red. Portfolios containing Affidavit of Harold Siegel, with lists of names, addresses, and present school or office location and position of individuals currently employed in the New York School System.	
Jan.19-71	Filed Affidavit containing the ethnicity of the individuals in the School System.	
Jan.20-71	Filed Affidavit containing the ethnicity of the individuals listed in the School System with envelope attached containing the list.	
Jan.20-71	Filed Affidavit containing the ethnicity of the individuals listed, with envelope attached containing list, by Lillian E. Silverman.	
Jan.20-71	Filed Affidavit of Arthur Cohen re: the ethnicity of the individuals listed in the list contained in the envelope attached.	
Jan.21-71	Filed one envelope containing list of ethnicity of individuals (no affidavit).	
Jan.21-71	Filed one envelope containing list of ethnicity of individuals, and affidavit of Sophie Sorkin.	
Jan.21-71	Filed one envelope containing list of ethnicity of individuals, and affidavit of [illegible] Moskin.	
Jan.21-71	Filed one envelope containing affidavit of [illegible] O'Brien and list of ethnicity of individuals (impounded in Vault Room 602).	
Jan.21-71	Filed [illegible] of the returned affidavits to counsel for the [illegible] portion.	
Jan 22,71	Filed one envelope containing affidavit of Myer Boland and list of ethnicity of individuals. (Impounded in Vault Room 602)	
Jan 22,71	Filed one envelope containing affidavit of Juliet Saunders and list of ethnicity of individuals. (Impounded in Vault Room 602)	
Jan 22,72	Filed one envelope containing affidavit of Dr. Max B. Meyers and list of ethnicity of individuals. (Impounded in Vault Room 602)	

continued next page

BURTON B. [redacted] 70 CIVIL 4111

D. C. 110 Rev. Civil Docket Continuation [redacted] JUDGE POLLACK

5a

DATE	PROCEEDINGS
Jan.22-71	Filed One envelope containing list of ethnicity of individua and affidavit of Dr. Irving Berenuck.
Jan.22-71	Filed One envelope containing list of ethnicity of individuals and affidavit of Abraham P. Tauchner.
Jan.22-71	Filed One Envelope containing list of ethnicity of individuals and affidavit of Jacob B. Zack.
Jan 22,71	Filed One Envelope containing list of ethnicity of individuals and affidavit of Murray Hart. (Impounded in Vault Room 602)
Jan 25,71	Filed one envelope containing affidavit of Carmella Nesi and list of ethnicity of individuals. (Impounded in Vault Room 602)
Jan 25,71	Filed one envelope containing affidavit of Dolores Chitraro, and list of ethnicity of individuals. (Impounded in Vault Room 602)
Jan 25,71	Filed one envelope containing affidavit of Carl B. Endberg, and list of ethnicity of individuals. (Impounded in Vault Room 602)
Jan 25,71	Filed one envelope containing affidavit of Rose L. Schwab, and list of ethnicity of individuals. (Impounded in Vault Room 602)
Jan 25,71	Filed one envelope containing affidavit of Charles I. Schonhaut, and list of ethnicity of individuals. (impounded in Vault Room 602)
Jan 25,71	Filed one envelope containing affidavit of Eugene T. Maleska, and list of ethnicity of individuals. (Impounded in Vault Room 602)
Jan 25,71	Filed one envelope containing affidavit of Elizabeth C. O'Daly, and list of ethnicity of individuals. (Impounded in Vault Room 602)
Jan 25,71	Filed one envelope containing affidavit of Nellie R. Duncan, and list of ethnicity of individuals. (impounded in Vault Room 602)
Jan 25,71	Filed one envelope containing affidavit of Anthony J. Ferreri, and list of ethnicity of individuals. (Impounded in Vault Room 602)
Jan 25,71	Filed one envelope containing affidavit of Elliott S. Shapiro, and list of ethnicity of individuals. (Impounded in Vault Room 602)
Jan 25,71	Filed one envelope containing affidavit of Dr. Edwin J. Hass, and list of ethnicity of individuals. (Impounded in Vault Room 602)
Jan 25,71	Filed one envelope containging affidavit of Ralph T. Brande, and list of ethnicity of individuals. (Impounded in Vault Room 602)
Jan 26,71	Filed one envelope containing affidavit of Helene M. Lloyd, and list of ethnicity of individuals. (Impounded in Vault Room 602)
Jan 25,71	Filed one envelope containing affidavit of Max G. Willinstein, and list of ethnicity of individuals. (Impounded in Vault Room 602)
Jan 25,71	Filed one envelope containing affidavit of Dr. Edythe J. Gaines, and list of ethnicity of individuals. (Impounded in Vault Room 602)
Jan 25,71	Filed one envelope containing affidavit of Alfredo Mathew Jr., and list of ethnicity of individuals. (Impounded in Vault Room 602)
Jan 26,71	Filed one envelope containing affidavit of Martin W. Frey, and list of ethnicity of individuals. (Impounded in Vault Room 602)
Jan 26,71	Filed one envelope containing affidavit of Cormac K. Meagher, and list of ethnicity of individuals. (Impounded in Vault Room 602)
Jan 27,71	Filed one envelope containing affidavit of Theodore Wiesenthal, and list of ethnicity of individuals. (Impounded in Vault Room 602)
Jan 27,71	Filed one envelope containing affidavit of Hugh McDougall Jr., and list of ethnicity of individuals. (Impounded in Vault Room 602)
Jan27,71	Filed one envelope containing affidavit of Frederick H. Williams, Assist. Supt., letter of Frederick H. Williams Assist. Supt., Affidavit of Frederick H. Williams, Executive Director office of personal, letter of Madeline M. Morrissey, Assist. Adm. Director, and affidavit of Mary Halleron, Communi Superintendent, and list of ethnicity of individuals. (Impounded in Vault)

Continued on back page.

70 Civil 4141 Boston M. Chance et al vs. The Board of Examiners and the Board of Education e

[redacted] [redacted]

JUDGE [redacted]

DATE	6a PROCEEDINGS	Date Order & Judgment Nos.
Jan 28,71	Filed one envelope containing affidavit of Samuel D. McClelland, and list of ethnicity of individuals. (Impounded in Vault Room 602)	
Jan.29-71	Filed Notice of Motion re: Add parties. Ret. 2/9/71.	
Jan.29-71	Filed Memorandum in support of pltfs'.motion to add parties.plaint ff.and b and caption.	
Feb.3-71	Filed Affidavit of Stanley Taylor, and placed in Envelope.	
Feb.5-71	Filed Answering Affidavit of Mark A. Jacoby to pltfs'.motion to add pltfs. and to amend amended complaint.	
Feb.8-71	Filed Affidavit of ethnicity of individuals, of Olvin McBarnette.	
Feb.10-71	Filed Affidavit of ethnicity of individuals, of Andrew G. Donaldson.	
Feb.10-71	Filed MEMO.END. on motion papers filed 1/29/71. Motion granted on default. So ordered. Tyatt, J.	
Feb.17-71	Filed Notice of Settlement and Order. Filed Order that National Opinion Research Center is appointed to obtain and furnish to the court and the parties, evidence as to the ethnicity of all applicants for the examinations for for supervisory service positions listed on Exhibit A-1, who are not currently employed in the New York City School System,etc.etc. So ordered. Mansfield, J. (mailed notice).	
Feb.23-71	Filed AMENDED COMPLAINT - CLASS ACTION.	
Mar.9-71	Filed Supplemental Affidavit of Thomas McGee, dated 3/4/71. Place in Vault Ro m 602.	
Mar.24-71	Filed a Report filed pur. to Judge Mansfield's Order of 2/16/71.	
Mar.24-71	Filed Request for Production of Documents under Rule 34.	
Mar.31-71	Filed Supplementary Report pur. to Judge Mansfield's order of 2/16/	
Apr.6-71	Filed Affidavit of Frederick H. Williams as to ethnicity of individu (Supplementary #4)	
Apr.12-71	Filed Request for Production of Documents under Rule 34.	
Apr.13-71	Filed Supplemental Affidavit of Thomas McGee, and placed in Vault Room 602.	
Apr.14-71	Filed letter from Univerity of Chicago re: signature of applicant Julius Berlman which has now been signed designating himself as "Caucasian or other".	
Apr.13-71	Filed Notice of Settlement and (Counter) Order. Ordered that the orders of this Court dated 12/29/70 and 2/16/71 are modified to the extent indicated, (1) The Clerk of the Court is directed to immediately transmit to counsel for the Board of Education the copy of the "pass-faillist" and covering affidavits of Thomas McGee, Administrator of the Board of Examiners, heretofore filed and sealed pur. to this Court's Order of 12/29/70, etc.etc. Mansfield, J. (mailed notice).	
Apr.16-71	Filed letter from National Opinion Research Center, Applicants whose race/ethnicity in the NORC report to the court of 3/24/71 was originally designated as not employed by the N.Y.City school system have stated to that organization that they are in the New York City school system . names starting with Pearl Crystel Scher, ending with James W. Salta.	
Apr.22-71	Filed Affidavit of Jacob B. Zack, Asst. Supt., Office of High Schools re: ethnicity of individuals listed. (Impounded and Placed in Vault Room 602).	
Apr.22-71	Filed Affidavit of Frederick H. Williams, Executive Director for Personnel, Office of Personnel re: ethnicity of individuals listed. (Impounded and Placed in Vault). One Envelope.	
Apr.26-71	Filed transcript of Record of Proceedings of Dec.18,1970.	
Apr.27-71	Filed Affidavit of Frederick H. Williams, Exe.Director for Personnel of ethnicity.	
Apr.27-71	Filed Affidavit of " " " " " " re: ethnicity information gathered by N. .C..	
Apr.27-71	Filed Summary ethnicity in formation gathered by N.O.R.C. (includes PF 1 - 50) and impounded and placed in Vault Room 602.	
Apr.28-71	Filed Affidavit of Thomas McGee dated Apr. 26,1971 Re: Pass-fail lists. impounded and placed in vault -room 602 in original Pass-fail envelope.	
Apr.27-71	Filed Rep[illegible]	

continued next page

BOSTON M. CHASCH ... THE BD. OF EXAMINERS, etc. et al.

70 CIVIL 4141 · JUDGE [redacted] 70 CIVIL 4141 ·

JUDGE [redacted] JUDGE DUFFY

Date	PROCEEDINGS	Date Of Judgment
Oct.28/71	Filed Memo. in reply to defts. memo. opposing pltffs' motion for preliminary injunction.	
Oct.28/71	Filed Affidavit in support of motion for preliminary injunction.	
Oct. 28/71	Filed Affidavit in support of motion for preliminary injunction.	
Oct.28/71	Filed Affidavit in support of motion for preliminary injunction.	
Oct.28/71	Filed Affidavit of William H. Ennals.	
Oct.28/71	Filed Affidavit of in support of motion for preliminary injunction.	
Oct.28/71	Filed Affidavit in support of motion for preliminary injunction.	
Oct.28/71	Filed Affidavit in support of motion for preliminary injunction.	
Oct.28/71	Filed supplemental memo. in opposition to pltffs' motion for preliminary injunction-submitted by deft. Board of examiners.	
Oct.28/71	Filed memo. on relevance of statistical tablations submitted in support of pltffs' motion for preliminary injunction.	
Oct.28/71	Filed supplemental Affidvit of Jacob Cohen, in support of motion for preliminary injunction.	
Oct.28/71	Filed Affidavit on the significance of statistical tabulations submitte support of motion for prelimimary injunction.	
Oct.28/71	Filed Second supplemental affidavit of Jacob Cohen in support of motion for preliminary injunction.	
Oct. 28/71	Filed Second supplemental briefin opposition to prelim. injunction.	
Oct. 28-71	Filed brief of Public Assoc. Education of City of N.Y.	
Oct. 28-71	Filed affdvt. of Nathan Jaspen.	
Oct. 28-71	Filed supplemental brief of the NY Assoc. of Black School Supervisors as amicus.	
Oct. 28-71	Filed affdvt. of Richard S. Barrett re: research studies.	
Oct. 28-71	Filed reply affdvt. of Dr. Murray Rockowitz.	
Oct.29-71	Filed memorandum of law in ppposition to pltffs' motion to allow a class action-submitted by deft. Bd. of Examiners.	
Oct 29-71	Filed MEMORANDUM & ORDER-- Having been advised that a notice of appeal has been filed from our order granting preliminary injunctive relief, we shall defer further action withrespect to motion for designation of suit as a class action until disposal of the appeal-So ordered-Mansfield,J m/n	
NOV 3 71	Filed Stipulation as to exhibits necessary for determination of the appeal.	
NOV 3 71	Filed Stipulation that certain parts as listed in Appendix A annexed, shall be retained in the district court.	
NOV 3 71	Filed Notice that the record on appeal has been certified and transmitted to the U.S.C.A. for the 2d Circuit this 3rd day of Nov. 1971.	
Feb 3-72	Filed true copy of USCA order that motion of appellee's to dismissthe appeal from USDC & to strike all papers filed by said appellants is granted & it is ordered that Weiner & Gottlieb are granted leave to file a brief amicus curiae within 8 days that copies of the brief shall be served on all parties & that appellees may file a answering affdfbriefs within 2 wks. after service of the brief upon them m/n	
Mar 31-72	Filed deft Board of Examiners ANSWER to amended complaint	KSF
MAY 31 72	Filed True Copy of USCA Order & Opinion that the order by Mansfield, J. granting pltffs' motion for prelim. injunction restraining defts from conducting further examinations for supervisory positions in the NY City school system, etc. hereby is affirmed with costs to be taxed against the appellant in the sum of $395.60. Docketed as a Judgment #72,589 CLERK. (mailed notices) ENT: 6-1-72.	
Jun 8 72	Filed Transcript of Record of Proceedings, dated 6/2/72.	
Apr23-73	Filed pltffs affdvt & Notice of Motion for default judgment, ret: 5/3/73 at 10AM in room 2604 befroe Mansfield,J.	
Apr23-73	Filed pltffs memo in support of motion for default judg.	

SEE NEXT PAGE #7

DATE	PROCEEDINGS JUDGE POLLACK JUDGE MANSFIELD JUDGE
Apr 25/73	Filed Affdvt. of Serv. for Motion for Default Judgment, by pltf Supporting Affidvt, & Memo of Law, on Defts.
Apr 26/73	Filed Defts. Affdvt. in Opposition by Charles A. Miele to Motion.
Apr 26/73	Filed Defts. Miele's Memo of Law in Opposition to Motion.
Apr.17-73	Filed Request to Enter Default.
May 21-73	Filed OPINION #39488, pltffs motion pursuant to Rule 23 is granted and this action is designated as a class action, etc. ~~The stip of settlement dated Mar. 8, 1973 is approved on~~ conditions as setforth. The motion of pltff for a default judgment & prelim injunction are denied, subject to the ~~condition that the prelim injunction in fjorce is modified~~ as indicated. Settle order on notice. Mansfield,J. mn
May 21-73	Filed stipulation and order that plaintiffs may obtain discovery and use any depositions, interrogatories, etc. obtained thru discovery and in the same manner,etc. as if named persons continued to be parties to the action whether or not they are in fact parties at the subsequent date. So ordered. Mansfield, J.
Jun 12-73	Filed Notice of settlement and Order determining this action as a class action, as indicated and a hearing is set for 6/28/73 at 10Am in room 501 to determin whether the settlement is fair and adequate. Mansfield,J. mn
Jun 26-73	Filed Charles Wiener Notice of intention to appear and Notice of Motion to intervene, filed 6/25/73
Jun 27-73	Filed Frankle & Greenwald notice of Intention to appear for the Council of Supervisors & Administrators of the City of NY Loacl 1, etc.
Jul 5-73	Affdvt of Elizabeth B DuBois in suppoert of pltffs memo re: Intervene ssubmitted by Charles Wiener
Jul 5-73	Filed pltffs memo in response to application to intervene submitted by Charles Wiener
Jul 10-73	Filed OPINION #39669. the applications of Mr. Wiener and CSA to intervene are denied, the stipulation of settlement should be approved as an interim procedure in the best interests of the pltff class and of the public school system as a whole. The stipulation of settlement is amended accordingly as provided at page 7-8 of the 5/21/73 decision to permit any party to apply to the court for modification of the judgment if a permanent plan in not adopted within the six-month period. Submit order accordingly on or before 7/12/73 Mansfield, J. mn

DATE	FILINGS—PROCEEDINGS
Sep 7-73	Filed order that the preliminary injunction previously entered and filed 9-20-71, is hereby modified to require all defts in this action not bound by the Court's final judgment entered to this date to adhere to the provisions contained herein pending final determination of the action as to them, except as provided. Mansfield, C.J. mn
Jul 12-73	Filed final judgment against deft Board of Examiners, its members and deft Chacellor of the City School Dist. of the City of NY, their agents servants employees and attorneys, and all persons in active concert and participation with them, are permanently enjoined and restrained from: conducting further examinations for supervisory positions; processing or grading or in any other way administering exams for supervisory positons or promulgating eligible lists kof issuing licenses solely on the basis of exams for supervisory positions, except as herein provided, entry of this judgment shall not constitute any determination of wrongdoing or misconduct and the Court reserves and retains jurisdiction herein for the purposes of entertaining applications for modifications as provided. Mansfield,C.J. Judgment entered 7-13-73, entered 7-19-73 mn
Jul 16-73	Filed affdvt of service of Notice of Settlement together with proposed Final Judgement and Preliminalry Injunction.
Jul 31-73	Filed Notice of Appeal of Charles Wiener, mailed copies.
Jul 31-73	Filed Charles Wieners Notice of Motion for a Stay of Enforcement of the Stip of Settlement.
Aug.10-73	Filed Respondent 's notice of appeal to the U.S.Court of appeals, from order of Judge Mansfield dated 7-12-73. Mailed copy to E.B. Dubois-D.Greenberg & Kaye,Scholar,Fierman,Hays & Mandler.
Aug 30-73	Filed transcript of record of proceeding of 6-28-73.
Aug 14-73	Filed Charles Wieners designation of exhibits and statement of Issues
Aug 20-73	Filed deft Bd of Examiners notice of designation of additional parts of the transcript.
Aug 20-73	Filed Charles Wieners Notice of Appeal re: Stay of Enforcement. mailed copies to DuBois;;Greenberg; Kaye Scholer Fierman Hays & Handler, and Corp Counsel. 8-30-73
Sep 17-73	Filed Stip & order extending the time to docket the appeal to 10-19-73. Mansfield,CJ.

BOSTON M. CHANCE, etal. V. THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK.

DATE	PROCEEDINGS	JUDGE
SEPT. 10-73	Filed Deft. Bd of Examiners for a modification of preliminary injunction in order to permit further examinations for supervisory positions, etc.	
SEPT. 10-73	Filed Stipulation of Settlement.	
SEPT. 10-73	Filed Affidavit in Opposition to plaintiffs' motion for a default judgment.	
SEPT. 10-73	Filed letter from Wilkie Farr & Gallagher to Judge Mansfield dtd. Sept. 6-73.	
SEPT. 10-73	Filed Affidavit in Opposition to proposed Stipulation of Settlement.	
SEPT. 12-73	Filed Charled Wiener's (intervenor-appellant) designation of exhibits	
SEPT-73	Filed plaintiffs' notice of designation of additional exhibits for inclusion in the record on appeal.	
OCT 4-73	Filed Notice of record certified and transmitted to U.S.C.A. App. on Oct.4.	
Aug.13-73	Filed deft's answering affidavit in opposition to motion for stay of enforcement.	
Aug.13-73	Filed plaintiff's response to motion forstayof enforcement.	
Aug.13-73	Filed memorandum of MANSFIELD,C.J.,dening application of MR. CHARLES WIENER for a stay of enforcement.	
Sept.26-73	Filed notice of designation of additional exhibits for inclusion in the record on appeal.	
Dec.27,73	Filed OPINION # 40151;Granting CSA and application to intervene for limited purpose of contesting issues raised by pltiff.Subject to an application by CSA to interene or offer proff.,the Board is barred until farther order of this Court from implementing the transfer provisions of the CSA agreement. Mansfeild,C.J.	
Jan.8-74	Filed MEMORANDUM of Civil Reassignment to Judge Tyler.(mn)	
Jan.8-74	Filed Order to Show Cause to intervene and for reconsideration of Decision dtd 12/27/73, ret. 1/21/74.	
Jan. 18-74	Filed Pltff's memorandum in response to motion for intervention and reconsideration of Council of Supervisors & Administrators	
Jan.18-74	Filed Execution of Judgment#3,543& Marshal's Returns: Served Liel Goldstein & Co.Inc. by Louis J.Coldstein,Pres.on 7/30/73 .JUDGMENT UNSATISFIED.dtd 1/16/74	
Jan.	Andrew Stuart Assoc.by Mr.Arnold B.Cantor,on 8/22/73 JUDGMENT UNSATISFIED.dtd 1/16/74	
Jan.22-74	Filed Memo end.on Order to Show Cause to intervene,etc.dtd 1/8/74. Motion granted for intervention of petitioner,CSA,Local,1,etc. pursuant to Rule 23 FRCP and subject to limitations expressed in last paragraph of opinion of court(per Mansfield)dated above 12/27/73.So Ordered.TYLER,J.(mn)	
Jan.22-74	Filed Affdvt by L.Bernikow for Deft.The Bd.of Education.	
Jan.22-74	Filed Affdvt.of Saul Z.Cohen for Deft.The Bd of Examiners.	
Jan 23 74	PRE-TRIAL CONFERENCE HELD BY Judge Tyler	
Jan.28-74	Filed Letter from Frankle&Greenwald,Esqs. dtd 1/28/74 in support of intervenor's motion for reconsideration and order of Judge Mansfield dtd 12/27/73,etc.asindicated.	
Jan 30 74	PRE-TRIAL CONFERENCE HELD BY Judge Tyler	
Feb.4-74	Filed Pltffs Memorandum in response to 1/28/74 Letter of Deft-Intervenor CSA	
Feb.26-74	Filed Affdvt of Personal Service by Sheldon Schorer on 1/9/74 upon Eric D.Balber ,of Legal Action Center for Pltff -Order to Show Cause; Affdvt by Leonard Greenwald on 1/8/74 upon Leonard Bernikow Atty for respondent, of Order to Show Cause.	
Feb.26-74	Filed Deft.CSA Memorandum of Law in support	
Feb.26-74	Filed Memorandum in opposition to application of CSA for reargument.	

JUDGE POLLACK

DATE	PROCEEDINGS
	1/1a
[illegible]	Filed Memorandum Opinion # 40435: Having grant[illegible] CSA's limited is[illegible] voorice & Kiap [illegible] argument?, concludes that interim prohibition against implementation of CSA transfer provisions received full consideration before Judge Mansfield. Accordingly, the Court declines to rescind or alter the decision of Judge Mansfield of 12-27-73. So Ordered. TYLER, J. (Mailed Notices)
[illegible] 7-74	Filed Memorandum Opinion # 40432. The Board of Examiners is ordered to submit to the Court, a description of its proposed job evaluation procedures within 20 days of this date of filing this memorandum and order. Tyler,J. (Mailed Notices)
Mar 13-74	Filed Deft. Council of Supervisors and Administrators of the City of NY Local 1, SASOC, AFL-CIO's Notice of Appeal from Memorandum & Order filed on 3-7-74. (Mailed Copy to Elizabeth B. DuBois, S.Z. Cohen, Nor Redlich, Esq. on 3-13-74)
Mar 13-74	Filed Memo Endorsed on Order of Same Date: Ordered that the motion of Local 1, SASOC, AFL-CIO is denied for the following reasons: I have extreme doubt that the order in question is appealable as a final order; assuming that this is an interlocutory order, it does not seem to be appealable under 28 USC 1292; two judges acting for this Court have each considered CSA's arguments, it seems unlikely that an appeal of this narrow side issue will do any more than delay the resolution of the case; at present it appears more than likely that the entire litigation may soon be concluded at the district court level; and the order which CSA attacks has been in effect since 12-27-73, hence there seems to be no compelling urgency for this appeal if such legally is permissable to go forward. TYLER,
Mar.[illegible]-74	[illegible] Filed Deft.Council of Supervisors and Administrators of City of New York,Local 1,SASOC,AFL-CIO appeals to USCA,2nd Circuit from Memorandum and Order entered 3/7/74.(Mailed copy to DuBois,Cohen& Redlich on 3/13/74.
Apr.10-74	Filed Affdvt of Service by Serinity Young for Corporation Counsel,City of NY by serving copies of Pltffs'Memorandum in support of Pltffs' Memorandum in support of Pltffs'Proposed Order and in opposition to Deft Board of Examiners'Proposed Counter-Order together with plt revised proposed order on counsel to Kaye,Scholer,Fierman,Hays& on 4/9/ 74.
Apr.16-74	Filed Deft.Board of Examiners Notice of Settlement&Order.A Hearing will be held before this Court on 4/26/74 at which time the parties will report whether they have reached upon a plan for a new permane comprehensive selection system for supervisoryp personnel in the N School System.If parties have not reached such an agreement,deft. Bd of Examiners shall be prepared to submit its proposed plan&Pltffs shall indicate whether in their view,hearing will be required in order to resol[illegible] objections to proposed plan,etc.TYLER,J.(mn)
May 23-74	Filed Proposed Intervenor's affidavit & show cause order permitting, Community Sch[illegible] Board,Dist. No.3 to intervene ret.5-24-74 at 2:30 P.M. RM 128. Tyler,J.
May 29-74	Filed Proposed Intervenors affdvt in support of motion to intervene pursuant to Rule 24(a)
Jun 3-74	Filed Deft.Board of Examiners Affdvt in opposition to motion to interven
June 3-74	Filed " " " " Memo of Law " " . " " " "

(Contd page 11)

DATE	12a PROCEEDINGS	Date Order Judgment No
[illegible]/74	Filed transcript of record of proceedings, dated 5/24/74	
[illegible]/74	Filed transcript of record of proceedings, dated 3/21/74	
Jul 1-74	Filed MEMORANDUM OPINION#40796.As it is well known,this court and the Court of Appeals for this circuit have recently noted on a number of occasions that this litigation,important as it may be,is also extremely old and must be brought to a conclusion.Motion to intervene denied in all respects.So Ordered. TYLER,J.(mn)	
24,74	Filed Memo End.on Order to Show Cause of 5/23/74.(recd 5/21/74) The within motion is in the courts descretion,deemed in all respects for for at least the following reasons;see rule 24 FRCP,as indicated. So Ordered.TYLER,J.(mn)	
Jul.5/74	Filed pltffs.' notice of motion for counsel fees and costs ret: 7/15/74.	
Jul.5/74	Filed pltffs.' memo. of law in support of motion for counsel fees,etc.	
Jul.5/74	Filed affdvt. of service of Sybil Gaynor of notice of motion & memo. of law in support upon defts.' attys on 7/3/74.	
Jul 9/74	Filed notice of appeal of proposed intervenors from final order denying in all respects their motion to intervene 6/11/74. mailed copies to E. DuBois,L. Bernikow,Kaye,Scholer,Fierman, Hays & Handler and Frankle & Breenwald.	
Jul 12-74	Filed Order to Show Cause why an order should not be made permitting Council of Supervisors&Adm.of City of NY etc to intervene in this action,etc.as ind. ret. 7/12/74.	
Jul 12-74	Filed Memo End.on Order to Show Cause Motion granted to extent indicated by undersigned at hearing today.SETTLE ORDER.Tyler,J(mn)	
Jul 17-74	Filed ORDER.Motion of CSA is granted insofar and only insofar as it seeks participation for CSA as intervenor,etc. as indicated;in all respects other than those set forth ,motion of CSA is denied.Tyler,J.(mn)	
Jul 18-74	Filed ORDER,of Intervenor,CSA. Motion of CSA granted,etc.same as above(mn)	
Jul 19-74	Filed Affdvt of M.A. Rebell for an order permitting NYC School Boards Assoc to appear by counsel as amicus curiae in hearings,etc.ret.7/25/74.	
Jul 18-74	Filed Bard of Examiners' Report on Results of its evaluation&examination of on-the job performance of acting supervisores in accordance with para.VI B of Final Judgment dated 7/12/74.	
Jul.23/74	Filed true copy of order and opinion of the U.S.C.A. that the orders of the Dist. Court are affirmed with costs to be taxed against the appellants. Clerk docketed as judgment #74,615. mn	
Jul 30-74	Filed Affdvt of Service by Michael A.Rebell for Amicus Curiae.	
Jul 30-74	Filed Memorandum of Law on behalf of Amicus Curiae	
Jul 31-74	Filed ORDER.Commencing with date of this Order & pending hearing&further Order of Court following furnishing by deft of information of items listed below ; no later than 9/6/74,deft Bd of Education shall furnish to Court,the parties, etc.the following information listed.All parties shall appear before this Court on 9/13/74 ,3:15 P.M. to consider what further orders,if any should be made in regard to matters set forth.Tyler,J.(mn)	
Jul 25074	Filed Memo End.on of 7/19/74 Motion.Motion granted. (mn)	
Jul 31-74	Filed Memorandum of Law on behalf of Amicus Curiae.	
Jul 31-74	Filed letter from Jeanne R.Silver to TMar,	
Jul 31-74	Filed Affdvt.of Frank C.Arricale for Defts	
7/23/74	Filed transcript of record of proceedings, dated 5/24/74	
Aug.5-74	Filed Stay of Enforcement of Final Judgment ,7/12/73; Affdvt of Charles Wiener &Affdvt of Service on Pltffs&Defts Attys.	

(cont'd pg.12)

BOSTON M.CHANG ET AL VS. THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF CITY OF NY ET AL

70-4141 JUDGE POLLACK

DATE	PROCEEDINGS	Date Order or Judgment
[illegible]	Filed Pltffs Memorandum in opposition to Mr.Wiener's motion for stay of enforcement and racial survey.	
[illegible]	Filed Affdvt of Service by Melody Bell for pltff on cf Memorandum in opposition to Mr,Wiener's motion for stay of enforcement and Racial survey on counsel for Defts and Charles Wiener,acting pro se by mail on 8/12/74.	
Aug.19-74	Filed Stip&Order of Dismissal of Appeal from final order denying in all respects their motion to intervene in this action shall be dismissed.So Ordered.Tyler,J. See pg.15	
Aug.26-74	Filed Pltffs'reply to defts "Memorandum in opposition to pltffs'motion for counsel fees and costs"	
Aug.28-74	Filed MEMORANDUM OPINION#41124.Mr.Wiener's motion (movant) as described heretofore is dismissed.So Ordered.Tyler,J.(mn)	
Aug.29-74	Filed transcript of record of proceedings, dated 7/30/74	
Aug.29-74	Filed transcript of record of proceedings, dated 9/13/74	
Sep.10-74	Filed Govt's Memorandum in reply to Affdvt in opposition "to motion to compel discovery.	
Sep.23-74	Filed Deft.Board of Education 's Affdvt by Frank C.Arricale in support of proposed excessing rules for supervisors and to supplement affdvt ,etc.	
Sep.19-74	Filed Affdvt of Peter F.O'Brien for Intervenor CSA	
Sep.26-74	Filed Pltffs'suppl.Memorandum regarding application of excessing rules.	
Oct.31-74	Filed transcript of record of proceedings, dated 9/13/74	
Nov.25-74	Filed Notice of Settlement&Order.Court's Order of 7/30/74 is rescinded&following provisions shall govern the intra-district&inter- district excessing of supervisory personnel in NYC school system,as indicated.Tyler,J. (mn) This order shall be effective retroactively to 7/30/74 and prospectively. until 11/30/77.	
Dec.3-74	Filed Transcript of Record of Proceedings dated 11/8/74.	
Dec. 3-74	Filed " " " " " " 10/10/74	
Dec.4-74	Filed pltff's affidavit & notice of motion to modify orders ret. 12-13-74.	
Dec.4-74	Filed pltff's memorandum of law in support of motion ret.12-13-74.	
Dec.5-74	Filed pltff's affidavit & notice of motion to issue an order clarifying certain previous orders entered, ret.12-14-74.	
Dec.16-74	Filed Affdvt of Murray Rockowitz for deft.Board of Examiners of Bd of Education of City of NY in opposition to pltffs'motion to hold defts in contempt & to modify Final Judgment 7/12/73.	
Dec.17-74	Filed Deft.Bd of Examiners'Memorandum of Law in opposition to pltffs'motion to hold defts in contempt and to modify July 12,1973 Consent Judgment.	
Dec.18-74	Filed Memo End.on motion for temporary restraining order against Bd. of Education signing a consulting contract with AIR is denied.See recordsof proceedings toddy for Court's reasons.So Ordered.Tyler,J(mn)	
Dec.19-74	Filed Memorandum of Law in support of pltffs'motion for temporary restraining order.	
Dec.19-74	Filed Memo End.on Motion of 12/4/74.Motion denied without prejudice to renewal for the reasons and subject to representations explicated upon the record at hearing thereon today.So Ordered.Tyler,J.(mn)	
Dec.18-74	Filed Memorandum of Law of amicus curiae in opposition to pltffs'motion re Automatic appt.	
Dec.18-74	Filed Memorandum of Law in support of pltffs'motion to have defts held in contempt and to modify previous orders of this court.	
Dec.18-74	Filed affdvt of Marie DeCanio for defts in opposition to pltffs motion to hold defts in contempt and to modify order.	
Dec.20-74	Filed Affdvt of service by Michael A.Rebell ,Amicus Curiae.	
Dec.20-74	Filed deft's(Board of Examiners) affidavit & notice of motion to modifying final judgment of 7-12-74. ret.1-14-75.	
Dec.20-74	Filed Deft.The Bd of Examiners Report Re: III B [illegible]	
Dec.24-74	Filed " " " " " Affdvt of Service by Alita Kleiner.	

BOSTON M.CHANCE ET ANO VS. THE BD OF EXAMINERS AND THE BD OF EDUCATION OF CITY OF NY

JUDGE POLLACK JUDGE [redacted]

Civil Docket Continuation

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14a

Date	PROCEEDINGS	Date Order Judgment
Jan.6-75	Filed Pltffs Affdvts&Notice of Motion to issue an order modifying Final Judgment of 7/12/73 against defts Bd of Examiners & Chancellor to provide a certain "Plan"annexed as Exhibit "A"to affdvt of Silver,etc.	
Jan. 6-75	Filed Pltffs' Memorandum in support of motion and opposing defts'motion to modify court's July 12,1973 orders.	
Jan. 6-75	Filed Affdvt of Service by Anita Klafter for Deft.Bd of Examiners.	
Jan.14-75	Filed Affdvt by Saul Z.Cohen for deft Bd of Examiners in opposition to pltffs' motion &in forther support of defts'motion to modify Final Judgment,etc.	
1/16/75	Filed Affdvt of Service by Robert Thacher for defts Bd. of Examiners of true copies of Borad of Examiners'Interim Report by mail on 1/15/75.	
1/27/75	Filed Memo End.on motion of 1/6/75.Within applications are denied for reasons dictated to the Court reporter at conclusion of hearing thereon today.So Ordered.Tyler,J.(mn)	
1/27/75	Filed Memo End.on motion of 12/20/74. Within motion is granted for reasons dictated to court reporter at conclusion of hearing today.In essence,in the appendix to the affdvt of Dr.Murray Rockowitz verified on 12/20/74 is approved.SETTLE ORDER as directed.Tyler,J.(mn)	
1/27/75	Filed memo end.on motion of 12/3/74.Motion is disposed of in accordance with findings and rulings of court dictated to the court reporter at conclusion of hearing on 12/17/74.It should be added that ruling of court upon this motion is subject to conditions and provisions explicated by undersigned on record So ordered.Tyler,J.(mn)	
1/29/75	Filed Bd of Examiners 'Interim Report on results of III B exam for principal of a Day High School.	
1/29/75	Filed affdvt of Leonard Bernikow for defts Bd of Education&Chancellor in opposition to pltffs'motion with regard to plan for selection of suprs within NYC School System,etc.	
1/31/75	Filed Memorandum.Pltffs'proposed counter order should be served&filed no later than 2/11/75.So Ordered.Tyler,J(MN)	
2/7/75	Filed transcript of record of proceedings, dated 12/17/74	
2/7/75	Filed transcript of record of proceedings, dated 12/20/74	
2/7/75	Filed OPINION#41855.Moveover,I am inclined to think that Court of Appeals for this circuit has already adopted a different view of racial quotas ,etc. I personally find rationale of this circuit more persuasive,this court is vound to ollow it in any event.Tyler,J.(mn)	
2/7/75	Filed ORDER.Furthis order shall not be construed to prejudice or limit the excessed supervisors'rights,if any,to return to vacancies in their home districts of law Tyler,J.(mn)	
2/7/75	~~Filed Deft.Bd of Examiner's Memorandum in opposition to pltffs'reargument motions and pltffs'proposed counter-order.~~	
2/13/75	Filed Intervenor's Notice of Appeal from order entered 2/7/75,clarifying&modifying order of 11/22/74 which rescinded order of 7/30/74,etc.(mailed notice to Elizabeth B.DuBois; Jeanne Silver;Leonard Bernikow;Saul Z.Cohen; and Michael Rebell on 3/4/75)	
2/14/75	Filed Defts.Bd of Education&Irving Anker Notice of Appeal from order of 2/7/75 which modified order of Court of 11/22/74 regarding excessing(mailed notice to Kaye,Scholer,Fierman,Hays&Handler;Elizabeth B.DuBois;Jeanne R.Silver; Frankle&Greenwald;& Rebell&Krieger on 3/5/75)	
2/18/75	Filed Bd of Examiners'Final Report of results of on job performance evaluations of acting suprs who had submitted applications by 11/8/74	
2/28/75	Filed Affdvt of Service by Robert Thatcher for Deft.Bd of Examiners on 2/27/75 by mail.	
12/24/75	Filed transcript of record of proceedings dated 12/17/75	

(over to 14)

[redacted] et al Vs. Bd of Examiners et al

JUDGE POLLACK

DATE	PROCEEDINGS	Date Or Judgment
	15a	
[illegible] 10-74	Filed Notice of change of attys address of Rahall&Krieger.	
[illegible] 13-74	Filed Suppl.Memorandum of Law on behalf of Amicus Curiae.	
	Filed Affdvt [illegible]	
	it defts [illegible]	
	[illegible]	IN EDITION
3/25/75	Filed Order modifying Final Judgment & Order [illegible] jurisdiction pursuant to Para XIV of Final Judgment of 7/12/73 shall entertain appropriate applications for attys' fees and [illegible] as may be necessary to protect privacy of individuals or the [illegible] tiality of test questions or to hear challenges as to constitutionality of any new test which is implemented.Tyler,J.(mn)	
03-31-75	Filed OPINION #42144.Unfortunately ,based on history of this litigation and the apparent absence of trust between the parties and counsel, it is unlikely that conflicts will arise.To avoid delay in implementation of a new constitutional licensing system,I have tried to limit the litigable issues while insuring that the new system will be constitutional. Essentially defts must provide all relevant information,absent an order to avoid dissemination of test questions or of the identity of examiners before a test is given,etc as indicated. The March 25th Order and Plan was amended to effectuate these goals as well as possible.Tyler,J.	
04-04-75	Filed Notice that record on appeal has been certified and transmitted to USCA.	
04-04-75	Filed OPINION#42201.Furthermore ,it appears only just and equitable that fees should be awarded for all work since inception of this litigation.Pltff's motion is granted/ So Ordered.Tyler,J.(mn)	
4/8/75	Filed Bd of Examiners'Final Report of results of exams completed pursuant to Para III B of Final Judgment	
4/10/75	Filed Affdvt of Service by Kenneth C.Lee of a true copy of Bd of Examiners'Final Report,etc on Ms.Jeanne R.Silver on 4/8/75	
4.3.75	Filed stipulation as to letters to be transmitted to USCA as part of Record on Appeal	
4/17/75	Reassigned to Pollack,J(mn)	
4-24-75	Filed notice that the suppl. record on appeal has been certified and transmitted to the U.S.C.A.	
5-01-75	Filed Board of Examiners' Report pursuant to paragraph VII of the consent judgment entered 7-12-73 and thereafter modified by order entered 3-25-75.	
5/2/75	Pre-trial before Pollack,J	
* 4/24/75	Filed stipulation transmitting certain letters to U.S.C.A. (July 16&24 as part of record.	
05-28-75	Filed Bd of Examiners'Suppl.Report of results of exam completed pursuant to Para III B of Final Judgment.	
06-20-75	Filed Stip&Order that proceedings to determine actual amt of attys fees&costs due pltffs deferred till new date set by Court;deft Bd of Education s motion for reconsideration to be filed no later than 7/1/75.Pollack,J	
06-01-75	Filed Charles Wiener's motion re: costs and attys.' fees,etc.	
7/10/75	Pre trial before Pollack,J.	
06-26-75	Filed Deft.Bd of Examiners report pursuant to para VII of consent judgment.	

DATE	16a PROCEEDINGS Pg.15
08-27-75	Filed Pltffs Memorandum regarding pltffs claim for counsel fees&costs against the CSA-Deft-Intervenor.
08-29-75	Filed Affdvt of Service by Pauline Reinish for Pltffs of Memorandum regarding Pltffs'claim for counsel fees&costs against CSA by mail upon: Greenwald,Cohen,Richland,Rebell,Esqs. on 8/29/75.
09-16-75	Filed Intervenor-s Memorandum opposing claim for counsel fees&costs against CSA
09-17-75	Filed Deft.Bd of Education Affdvt&Notice of motion for reconsideration of Award of Attys'fees,ret.9/26/75.
09-17-75	Filed Deft.Bd of Educations Memorandum of Law in support of Memorandum of Law in support of motion for reconsideration of award of attys'fees.
09-24-75	Filed Pltffs Affdvt&Notice of motion for leave to amend complaint ret.10/3/75.
09-24-75	Filed "Memorandum in opposition to deft.Bd of Education's motion for reconsideration of award of attys'fees&costs&to deft-intervenor CSA's Memorandum opposing pltff's claim for attys/fees&costs.
10-01-75	Filed Pltffs' response to deft's reply memorandum of Counsel fees issue.
10-02-75	Filed Deft's Affdvt&Notice of cross-motion to dismiss amended complaint.
10-08-75	Filed Pltffs'Reply to Board of Examiners'Memorandum of Law opposing Amendment of Complaint and to Bd of Educations's cross-motion to dismiss amended complaint.
10-14-75	Filed Deft.Bd of Examiners'Memorandum of Law in response to pltffs'reply Memorandum
10-17-75	Filed true copy of USCA that appeal from order is dismissed with no costs to be taxed against appellant.Clk.(mn)
12-29-75	Filed Bd of Examiners' Report of Consent Judgment entered 7/12/73 modified by order entered 9/2/75.
1-05-76	Filed Affdvt of Service by Gloria E. Seaman of copy of Bd.of Examiners'Report by mail upon Dorothy Cousin,Corp.Counsel Municipal Bldg.NY10007
1/22/76	Trial before Pollack,J
02-11-76	Filed OPINION#43874,Motion of deft.Bd of Education to strike award heretofore made of attys'fees to pltffs is thus denied.Pltffs'motion to amend complaint is denied,cross-motion of deft.Bd of Education to dismiss amended complaint is moot.Reasonable fee for pltffs'attys will be determined and awarded upon evidentiary hearing of relevant facts.Pltffs'application should be completed and served on defts/ who may have documentary discovery and take any desired appropriate depositions upon informal notice&request therefor,same to be completed within 60 days hereof.Date of hearing will be fixed upon advice to Court that parties are ready to proceed therewith.So Ordered.Pollack,J(mn)
02-11-76	Filed Memo End.on motion of 7/1/76.No liability for costs or counsel fees has attached to or will be imposed on Charles Wiener (pro se)for his actitities herein as amicus curiae.Motion granted accordingly.So Ordered.Pollack,J (mn)
3/4/76	Trial before Pollack,J
03-18-76	Filed Intervenors Affdvt&Notice of motion ret.3/18/76.
04-01-76	Filed Affdvt of Deft.Bd of Examiners by Howard A.Jacobson re:motion of Council of Suprs&Adm.of City of NY to intervene.
04-02-76	Filed Stip&Order extending time for service on defts by pltffs of documented application for an evidentiary hearing and for completion by parties from 4/12/76 to 5/12/76.Pollack,J
04-02-76	Filed Affdvt of Service by Helen Rosenberg for Pltff of service of Stipulation on Saul Z.Cohen,Esq by mail on 4/1/76.
04-20-76	Filed Deft.Bd of Examiners Notice of Motion for an order of Consent Judgment implementing Consent Judgment by authorizing & directing deft to prepare job analyses for 3 prototypical positions described,ret.date& time set by Court.

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DATE	PROCEEDINGS
	17a
04-20-76	Filed Deft.Bd of Examiners Memorandum of law in support of motion for an order implementing consent judgment.
05-04-76	Filed Affdvt of Elizabath B.DuBois in support of Pltffs'response to CSA motion to intervene.
05-04-76	Filed Affdvt of Service of Elizabeth B.DuBois for p ltffs in response to motion to intervene with service made by mail on W.Bernard Richland,Esq and Greenwald, Saul Z.Cohen,Esqs.
05-04-76	Filed Pltffs'Memorandum in response to CSA motion to intervene.
05-05-76	Filed Stip&Order extending time for service on deft by pltffs of documented applica for an evidentiary hearing on issue of amt awarded pltffs for attys fees&cost completion by parties of any discovery from 5/12/76 to 6/14/76 for reasons se Pollack,J. including effects of Siegel Fee Law
05-07-76	Filed Deft.Bd of Examiners exhibits(to Bd of Examiners affdvts in opposition to motio to modify consent Judgment.(by Ethel Fitzgerald)
05-07-76	Filed Deft.Bd of Examiners'Memorandum of Law in opposition to motion to modify Conse Judgment.
05-13-76	Filed Pltffs'Memorandum in opposition to deft.Bd of Examiners'motion for an order "Implementing the Consent Judgment"
05-18-76	Filed Bd.of Educations'memorandum in opposition to deft.Bd of Examiners'motion for an order "implementing consent judgment.
05-18-76	Filed Affdvt by Robert Christen for defts in opposition to Bd.of Examiners'motion for order "implementing consent judgment."
05-19-76	Filed Bd of Education's Memorandum in opposition of council of supervisors and adm.of of NY to intervene.
05-19-76	Filed Memorandum .Motion by CSA for an order granting intervenor status in all respec denied.Pollack,J(mw)
05-24-76	Filed Affdvt of Paul L.Tractenberg for pltffs in support of position regarding deft. Bd of Education/s motion to modify Court's order of 3/25/75 in order to approv e modified plan for licensing&selection of supervisors.
05-24-76	Filed pltffs'reply Memorandum of Law.
05-24-76	Filed Reply Affdvt of Murray Rochowitz for deft.Bd of Examiners in reply to answerin affdvt of Robert Christen.
05-24-76	Filed Deft.Bd of Examiners Reply Memorandum in support of motion to implement Consent Judgment.
06-01-76	(recd this date) Filed affdvt of service of Helen Rosenberg for pltffs.
06-01-76	" " " Filed Affdvt of Jeanne B.Silver in support of motion of defts .Bd of Education&Chancellor of City School System.
06-01-76	" this date)Filed affdvt of Robert Christen in support of motion of NY City Bd.of Education &Chancellor of City School System for an order approving modifie for licensing&selecting supervisors.
06-01-76	Filed this date-Filed affdvt of Robert Christen for defts in support of April 9,1976
06-01-76	Recd this date-Filed Pltffs'memo regarding deft.Bd of Education motion to modify C order of 3/25/75.
06-01-76	Filed Memorandum in support of Bd.of education&Chancellor's motion to modify 3/25/7 Order and plan.
06-01-76	Filed Deft.Bd of Examiners'Report pursuant to Para VI of Consent Judgment.
06-01-76	Filed Affdvts of Dr.Christen&Owens in reply to Bd.of Examiners opposition to Bd.of Education's motion.
06-01-76	(recd this date)Filed Bd of Education's reply memorandum.
06-01-76	Filed Memo end.on notice of motion of same date.Motion granted as indicated on record 6/1/76
06-22-76	Filed Pltffs. Document d application for fixing of counsel fees.

POLLACK, J.

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D. C. 110 Rev. Civil Docket Continuation — Pg.18

DATE	PROCEEDINGS 18a	Date Ord Judgment
07-07-76	Filed Notice of settlement to be presented to Pollack,J.on 7/6/76.	
07-07-76	Filed Judgment modifying Order of 3/25/76.Ordered that Defts.Bd of Education& Chancellor is granted.(II)Deft.Bd of Examiners'motion"to implement" 3/25/76 order is denied.(III)Para VI of 3/25/75 Orders Plan are stricken.(IV)Plan for Licensing&Selecting Supervisores in NY City School System is approved,etc. (V)Reporting provisions in introductory sub para A-D ,para VII of 3/25/75 Order re deleted,etc.(VI)Except to extent ,provisions of Final Judgment of 7/12/73&3/25/75 Order shall continue as against all defts.Pollack,J JUDGMENT ENTERED.Clk(mm) Ent.7/12/76	
07-26-76	Filed transcript of record of proceedings, dated 6/1/76	
07-27-76	Filed Deft.Board of Examiners Notice of appeal from "Judgment Modifying Order of 3/24/75" entered on 7/7/76,from each and every portion of said judgment. (mailed copy to Elizabeth B.DuBois&Corporation Counsel's Office,Municipal Bldg.NY on 7/28/76)	
08-02-76	Filed true copy of USCA Order and Opinion:Order reversed and action is remanded to District Court for further proceedings with no Bill of Costs filed.Against appellees.Clk(mm)	
08-26-76	Filed Affdvt by Rebecah Rothman for deft.Bd of Education&Chancellor in opposition to proposed counterorder with respect to "Excessing"notice for settlement.	
08-25-76	Filed Deft.Bd of Examiners report pursuant to para VII of Consent Judgment entered 7/12/73.	
08-25-76	Filed Defts Bd of Education and Chancellor Notice and Order. Ordered that Bd. of	
08-25-76	Education shall award constructive seniority to members of Chance & Mercado classes in effecting excessing or lay-offs on "last hired-first fired" basis;ordered that in calculating constructive seniority to which members of Mercado class are entitled for purposes of any excessing or lay-offs to be completed within 14 days of entry of this order.Pollack,J.(mm)	
08-26-76	Filed Addendum to true copy of USCA Order and Opinion filed 8/2/76.	
08-27-76	Filed Notice that original record on appeal has been certified and transmitted to USCA,2nd Circuit.	
08-31-76	Filed transcript of record of proceedings, dated 08-01-76	

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By Eat Beckan
Deputy Clerk

(178a)

Plaintiffs' Amended Complaint, served on
February 22, 1971

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE, LOUIS C. MERCADO, CLARA BURGESS, FAITH RINGGOLD, SHIRLEY RANDALL, MARIA C. CESTERO, EDWARD BONNEMERE and MARIA SANTOS, individually and on behalf of all others similarly situated,	
v.	
THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK; GERTRUDE E. UNSER, individually and in her capacity as Chairman of the Board of Examiners; JAY E. GREENE, MURRAY ROCKAWITZ and PAUL DENN, individually and in their capacities as members of the Board of Examiners; MURRY BERGTRAUM, individually and in his capacity as President of the Board of Education; ISAIAH E. ROBINSON, JR., individually and in his capacity as Vice-President of the Board of Education; MARY E. [illegible], SEYMOUR P. LACHMAN, and JOSEPH MONSERRAT, individually and in their capacities as members of the Board of Education; HARVEY B. SCRIBNER, individually and in his capacity as Chancellor of the City School District of the City of New York; and FREDERICK H. WILLIAMS, individually and in his capacity as Executive Director of the City School District of the City of New York.	CIVIL ACTION No. 70 Civ. 4141 AMENDED COMPLAINT - CLASS ACTION

JURISDICTION

1. This is a civil action brought under Title 42 U.S.C. §1981 providing for the equal rights of citizens and of all persons within the jurisdiction of the United States; Title

42 U.S.C. §1983 to redress the deprivation under color of state law, statute, ordinance, regulation, custom or usage of rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States; Article 5 §6 of the New York State Constitution and §2590-j 3 (a)(1) of the New York Education Law, requiring that merit and fitness, as determined by examinations, be the basis for appointments and promotions in New York City public school system; §2569(1) of the N. Y. Educ. Law guaranteeing the validity and reliability of examinations and examination procedures in the New York City public school system; and §2573(10) of the N.Y. Educ. Law vesting in the Board of Education of the City of New York exclusive authority to establish the academic and professional qualifications for the City license of principal and of certain other positions, to enjoin violations thereof. Plaintiffs also seek a declaratory judgment pursuant to Title 28 U.S.C. §2201. The matter in controversy, exclusive of interest and costs, exceeds the sum of ten thousand dollars ($10,000.00). Jurisdiction is conferred on this Court by Title 28 U.S.C. §§1331 and 1343(3).

CLASS ACTION ALLEGATIONS

2. Plaintiffs bring this action in their own behalf and as a class action pursuant to Rule 23(b)(1) and (2) of the Federal Rules of Civil Procedure. The class includes all those who (1) have failed supervisory examinations for which eligibility lists are to be published or are eligible to take supervisory examinations to be given in the future and (2) are members of minority groups who suffer from cultural disabilities imposed by historical patterns of educational and social discrimination or

are untutored in the esoterics of test-taking in the New York City school system.

3. It would be unduly burdensome and impractical to enumerate exactly the members of the class; however, a rough approximation indicates the number to be in the thousands. Deputy Chancellor Anker has indicated that the blacks and Puerto Ricans eligible for merely one supervisory examination scheduled for the fall (the elementary school principals' examination) number somewhere between three and four hundred. New York Times, July 24, 1970. On information and belief, fourteen additional supervisory examinations are presently scheduled for 1970-71, suggesting the existence of several hundred more eligibles from minority groups. Furthermore, on information and belief, a number of eligibility lists established pursuant to supervisory exams already given are about to be published, indicating the existence of additional members of the class, numbering in the hundreds.

4. Plaintiffs are members of the class: both plaintiffs are eligible to take a supervisory exam scheduled in the future (the elementary school principals' exam) and both are members of culturally disadvantaged minorities (Mr. Chance is black and Mr. Mercado is Puerto Rican).

5. The members of the class, numbering in the thousands, are so numerous as to make joinder impracticable.

6. Clearly, there are questions of law or fact common to the class. The alleged discrimination in violation of the Fourteenth Amendment has a similar negative impact on the interests of each member of the class. Administration of unvalidated exams in violation of the provisions of N.Y. Educ. Law §§2569(1), 2590-j 3(a)(1) and of Article V, Section 6 of the New York State

Constitution obviously will have a particularly onerous impact on the class described in Paragraph (2) supra. In addition, the existence of common questions of law or fact is implicit in a finding that the class action satisfies the requirements of F.R.C.P. 23(b)(1) or (2).

7. The claims of the representative parties are typical of the claims of the class, and the representative parties will fairly and adequately protect the interests of the class. It is obvious that the named plaintiffs share the issues and interests of the absentee members of the class. All members of the class are barred from permanent supervisory positions in the school system because they have no license. Both the named plaintiffs and unnamed members of the class are members of minority groups who are eligible to take supervisory examinations, all of which are alleged to be discriminatory, invalid and otherwise in violation of the law. There is no suggestion of any antagonistic interests among members of the class. It is equally obvious that both named plaintiffs intend to prosecute the interests of the class vigorously. Both clearly desire permanent supervisory positions. Both Mr. Chance and Mr. Mercado are presently serving as acting principals; both are eligible for the position of principal, elementary school except that they do not possess the requisite license; Mr. Chance has taken and failed one previous supervisory examination. Thus, it is clear that the intense commitment of the named representatives to the goal of declaring invalid and enjoining the present system of examining and licensing supervisory personnel in the school system is unassailable, and that this goal is coextensive with the interests

of the other members of the class.

PARTIES

8. Plaintiff Boston M. Chance, who has been employed in the pedagogical service of the New York City public school system for the past 15 years, is black, holds a New York State principal's certificate, and is acting principal of Public School 104, an elementary school in the Bronx. Plaintiff Chance possesses all the educational and experience qualifications established by law and by the Board of Education and the Chancellor of the New York City School District for the position of principal, elementary school. He is barred at present from being appointed permanent principal because he does not have a New York City license as elementary school principal.

9. In September, 1968, plaintiff Chance took the examination conducted by defendant Board of Examiners for the position of Assistant Principal, Jr. High School. He failed to pass that examination and therefore was not on the eligibility list established July 15, 1969, for said position, and was not issued a license entitling him to permanent appointment in said position.

10. Plaintiff Louis C. Mercado, who has been employed in the pedagogical service of the New York City school system for 12 years, is Puerto Rican, holds a New York State principal's certificate, and is acting principal of Public School 75, an elementary school in Manhattan. Plaintiff Mercado possesses all the educational and experience qualifications established by law and by the Board of Education and the Chancellor of the New York City School District for the position of principal, elementary school. He is barred at present from receiving appointment as permanent principal because he does not have a New York City license as

elementary school principal.

10a. Plaintiff Clara Burgess, a resident of the City of New York, is black. She has been an employee of the New York City public school system for seventeen (17) years, and is presently Evaluator of Head Start Programs for Community School District 7. Plaintiff Burgess holds state certification for elementary school principal, and is a candidate in the most recent examination for the New York City license of elementary school principal, the written portion of which was given on November 3, 1970.

10b. Plaintiff Faith Ringgold, a resident of the City of New York, is black. She has been an employee of the New York City public school system for fifteen (15) years, and is presently a teacher of art at Brandeis High School. She is also a lecturer in art at Bank Street College and Wagner College. Plaintiff Ringgold failed the examination of defendant Board of Examiners for the New York City license of supervisor of art which commenced in March, 1968.

10c. Plaintiff Shirley Randall, a resident of the City of New York, is black. She has been an employee of the New York City public school system for fifteen (15) years, and is presently a teacher of retarded children at the Bronx Occupational Training Center, a facility of defendant Board of Education. Plaintiff Randall is a candidate in the most recent examination for the New York City license of Supervisor in the Bureau of Children of Retarded Mental Development, the written portion of which was given in June, 1970.

10d. Plaintiff Maria C. Cestero, a resident of the City of New York, is Puerto Rican. She has been an employee of the New York City public school system approximately fourteen (14) years

and is presently acting principal of Public School 120, an elementary school in Brooklyn. Plaintiff Castero holds state certification for elementary school principal. She failed the examination of defendant Board of Examiners for the license of Assistant Principal of Junior High School which commenced in September, 1968 and is a candidate in the most recent examinations for the New York City licenses of Elementary School Principal, the written portion of which was given November 3, 1970, and for Administrative Assistant of High School, the written portion of which was given December 29, 1969.

10e. Plaintiff Edward Bonnemere is black. He has been an employee of the New York City public school system for fifteen (15) years, and is presently a teacher of music at Intermediate School 55 in Brooklyn. Plaintiff Bennemere failed the examination of defendant Board of Examiners for the New York City license of Chairman of Music for Junior High School, commenced in or about 1966.

10f. Plaintiff Maria Santos, a resident of the City of New York, is Puerto Rican. She has been an employee of the New York City public school system for seventeen (17) years, and is presently Coordinator for the study of English as a second language for Community School District #9 in the Bronx. Plaintiff Santos holds state certification for secondary school principal. She failed examinations of defendant Board of Examiners for the New York City licenses of Junior High School Chairman of Foreign Languages and Senior High School Chairman of Foreign Languages, administered in or about 1966.

11. Defendant Board of Education exists pursuant to the laws of the State of New York (N.Y. Educ. Law §§2552 and 2590-b) and is declared by law to be a body corporate (N.Y. Educ. Law §2551). Said Board of Education is empowered and required, inter alia, to establish and maintain such free elementary and other schools as it deems necessary to meet the needs and demands of the City of New York (N.Y. Educ. Law §2554(9)); and to designate the academic and professional qualifications required for the license of principal and of certain other positions (§2573(10), N.Y. Educ. Law). Defendants Murry Bergtraum, Isaiah E. Robinson, Jr., Mary E. Meade, Seymour P. Lachman, and Joseph Monserrat, constitute the membership of defendant Board of Education. Their terms extend to July 1, 1971.

12. Defendant Chancellor Harvey B. Scribner is chief administrative officer of the City School District of the City of New York and functions pursuant to §2590-h of the N.Y. Educ. Law. Said Chancellor is empowered and required, inter alia, to promulgate minimum education and experience requirements for all supervisory service positions (N.Y. Educ. Law §2590-j(2)).

13. Defendant Deputy Superintendent of Schools Theodore H. Lang is the chief personnel officer of said school district.

14. The Defendant Board of Examiners exists pursuant to the laws of the State of New York, discharging governmental functions (N.Y. Educ. Law §2569(1)). Said Board of Examiners is empowered and required, inter alia, to prepare and administer examinations to determine the merit and fitness of applicants for New York City teachers' and supervisors' licenses (N.Y. Educ. Law §2590-j(3)(a)(1)). Defendants Gertrude E. Unser, Jay E. Greene, Murray

Rockawitz and Paul Denn are members of said Board of Examiners.

FACTUAL BACKGROUND

15. The New York City public school system is composed of 916 schools, and has a pupil population of 1,123,165 that is 33.6% black and 22.2% Puerto Rican. Said system employs approximately 937 principals or others in charge of schools, 1,851 assistant principals and administrative assistants, 943 department chairmen, 1,465 guidance counselors and 62,891 day teachers.

16. In order to obtain a permanent appointment to any supervisory position, an individual needs an appropriate New York City license (N.Y. Educ. Law §§2569, 2590-j(1), (4)b, (4)d). Such licenses are issued by defendant Board of Education only to persons who meet qualifications that it and the Chancellor have established as required by law, and who have passed an examination procedure prepared and administered by defendant Board of Examiners. These licenses are in addition to state requirements for supervisory positions. Of all the school districts in the State, only the City School District of the City of New York maintains a Board of Examiners and this specific examination and licensing procedure. Indeed the only other school district in the state in which the law provides for examinations in addition to state certificate is Buffalo. N.Y. Educ. Law §2573(10-a).

17. Were it not for New York's examination and licensing procedure, plaintiffs Chance and Mercado would be appointed permanent elementary school principals. Both already have attained State certification for that position, and both were

selected for their present acting principalships by their respective community school boards, in accordance with New York City's decentralized system, after extensive selection processes. Moreover, both are specially trained to be principals, having graduated a year-long Fordham University Instructional Administrators and Principals Internship Program in Urban Education.

18. There is at present no outstanding list for the position of elementary school principal. The Board of Examiners has announced its intention to hold an examination procedure for the position of elementary school principal on November 3, 1970, and to promulgate a new list in the spring of 1971 based on such procedure. If plaintiffs Chance and Mercado do not pass such an examination procedure, they would have to be removed from their present positions--notwithstanding the merits of their performances--and replaced by persons on such a new list pursuant to N.Y. Educ. Law §2573(2); Board of Education By-Law 101(3).

19. Upon information and belief, in addition to the examination for the position of principal, elementary school, the Board of Examiners has scheduled approximately 14 other supervisory examinations for the year 1970-71. Upon information and belief said Board will in the coming months promulgate numerous eligibility lists and issue licenses for yet other supervisory positions based on past examinations.

20. There are approximately 1,000 persons who hold a city license of principal for some level of the New York public school system. Most - but not all - such persons actually head schools.

Others function in various administrative positions. Of the licensees only 11 are black (about 1% of the total) and only one is Puerto Rican. Upon information and belief, out of approximately 750 persons licensed as principal for New York City elementary school, five are black (less than 1% of the total) and none is Puerto Rican. The percentage of persons licensed for other supervisory positions who are black or Puerto Rican is also strikingly low compared to their percentage of the school student population. Thus, for example, upon information and belief, of the 180 administrative assistants for high schools none are black or Puerto Rican. Of the 1610 assistant principals, junior high and elementary schools, only 7.0% are black and .2% Puerto Rican. Further, at the time the list for the position of principal, elementary school, was originally promulgated, of 340 persons on the list only 6 or 1.8% were black and 0 were Puerto Rican. At the time the list for principal, high school was promulgated there were no blacks or Puerto Ricans among the 22 persons listed. At the time the list for principal, junior high school was promulgated, of the 115 persons on the list only 1(0.9%) was black and 1 (0.9%) Puerto Rican. At the time the list for assistant principal, junior high school was promulgated, of the 690 persons on the list only 55(8.0%) were black and none were Puerto Rican.

21. The Board of Examiners procedures are the major factor accounting for this low percentage in minority group personnel. The percentage of New York City school supervisory personnel who are black or Puerto Rican is strikingly lower than the comparable figures for the four next largest cities in the United States.

22. The Board of Examiners testing procedures are biased against blacks and Puerto Ricans. They frequently emphasize esoteric cultural facts unrelated to the supervisory positions

in question. Moreover, these tests place a premium on familiarity with organizational peculiarities of the New York City school system which, while having little to do with educational needs, are largely gained through coaching and assistance from present, predominantly white, supervisory personnel. Blacks and Puerto Ricans, not having had equal access with whites to such treatment, are at a severe disadvantage with respect to Board of Examiners tests.

23. The testing procedures do not indicate a candidate's ability to do the job being tested for. There is no evidence that they measure merit or fitness, they have never been validated, and they are unreliable psychological instruments. Moreover, they are not objective in their assessment of candidates but, on the contrary, are highly subjective. Upon information and belief, most or all such testing procedures contain written and/or oral portions. The questions are composed, and the candidates are evaluated and rated, by examination personnel who have had no training in professional test administration. Such examination personnel thus necessarily render their judgments -- both as to the pertinency of the questions and the appropriateness of the responses -- on the basis of their individual subjective predilections. There has never been any empirical study to determine whether these questions and the method of evaluating responses measure or predict a candidate's ability to do the job for which a test is given.

24. Moreover, because of the established discriminatory reputation which these Boards of Examiners procedures have in the black and Puerto Rican communities, a large portion of otherwise eligible minority group persons have been discouraged from seeking a license.

25. The administration by defendant Board of Examiners of unvalidated supervisors examinations, which has effected without any rational justification a racial classification because of the dearth of blacks and Puerto Ricans licensed therefrom, is a violation to the right of plaintiffs and their class to equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States. Plaintiffs and their class have no adequate administrative remedy available to them to challenge and prevent defendants' conduct and use of examinations for supervisory positions in the New York City School system.

26. Article V §6 of the New York State Constitution states in pertinent part:

> Appointments and promotions in the civil service of the state and all of the civil subdivisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination . . . .

Moreover, §2590-j 3(e)(1) of the New York Education Law states in pertinent part:

> The board of examiners shall prepare and administer objective examinations to determine the merit and fitness of all candidates for . . . supervisory service positions . . . .

The testing procedures of defendant Board of Examiners, being neither objective nor being measurements of merit and fitness for the particular jobs involved, and yet being a basis for promotion in the civil service, are conducted in violation of Article V §6 of the New York State Constitution and §2590-j 3(a)(1) of the New York Education Law.

27. Section 2569 subd. 1 of the New York Education Law states in pertinent part:

> . . . The Board[of Examiners] shall periodically review the validity and reliability of examinations as well as examination procedures . . . .

Although this provision has been in effect since 1967, the Board of Examiners has never complied with it. This provision represents the determination by the Legislature that merit and fitness can only be demonstrated by examinations that have been proven valid. Thus every Board of Examiners testing procedure for supervisory positions which is presently planned or scheduled, such as that for elementary school principal, is in dereliction of said §2569(1).

28. Section 2573(10) of the New York Education Law states in pertinent part:

> . . . The board of education, on the recommendation of the superintendent of schools [Chancellor] shall designate, subject to the other provisions of this chapter, the kind of grades of licenses which shall be required for service as principal . . . principal, branch principal, director, assistant examiner in the board of examiners, supervisor or teacher of a special branch, head of department, assistant, . . . together with the academic and professional qualifications required for each kind and grade of license . . .

The Board of Examiners, on the other hand, has no statutory authority to establish academic or professional qualifications for any license. Nevertheless, upon information and belief, the Board of Education has in the past and plans to continue a practice of leaving to the exclusive discretion of the Board of Examiners the perparation, administration and grading of supervisory examinations, including the proposed forthcoming examination procedure for the position of elementary school principal, together with the determination of the appropriate academic and professional level of the content of said examination. The result of this total deference by the Board of Education to the Board of Examiners is that the latter body effectively establishes

the level and quality of academic and professional qualifications which are required to obtain the license of elementary school principal. The Board of Examiners is the sole determinant of the academic knowledge and professional abilities which a candidate must possess for successful completion of the testing procedure. The administration of any examination procedure for the position of principal in which the Board of Education does not specifically instruct the Board of Examiners as to the particular academic and professional qualities it is to test for, is an unlawful delegation of authority in violation of said §2573(10).

WHEREFORE, plaintiffs respectfully pray:

(a) that this Court declare that defendant Board of Examiners' present and planned use of supervisory examination procedures is in violation of the Fourteenth Amendment of the Constitution of the United States and under the doctrine of pendent jurisdiction, declare the same in violation of §§2569(1), 2590-j 3(a)(1) and 2573(10) of the New York Education Law, and of Article V §6 of the New York State Constitution;

(b) that defendants and their successors be preliminarily and permanently restrained and enjoined from administering or otherwise making use of any written and/or oral test, as a criterion for the granting or withholding of the New York City license of elementary school principal or of any ohter New York City public school system supervisory license, which

35a

has not been prepared and validated in accordance with the latest standards of professional psychological testing as accurately measuring the merit and fitness of candidates to perform the tasks of the position for which the testing is being administered;

(c) that defendants and their successors be further preliminarily and permanently enjoined from administering or making use of any examination for principal, or other supervisory positions covered by N.Y. Educ. Law § 2573(10), which has not been prepared in accordance with, which does not strictly adhere to, and which in any way exceeds specific academic and professional standards for the license established by the Board of Education pursuant to said §2573(10);

(d) that this Court retain jurisdiction in the action until such time as defendants comply with the constitutions and statutes cited herein;

(e) that this Court award plaintiffs their costs and attorneys' fees; and

(f) that this Court grant such other and further relief as may be proper.

Respectfully submitted,

JACK GREENBERG
JONATHAN SHAPIRO
ELIZABETH B. DUBOIS
STEPHEN G. YOUNG
10 Columbus Circle
New York, New York 10019

GEORGE COOPER
435 West 116th Street
New York, New York 10027

Board of Examiners' Answer, served
on April 21, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE, LOUIS C. MERCADO, CLARA BURGESS, FAITH RINGGOLD, SHIRLEY RANDALL, MARIA C. CESTERO, EDWARD BONNEMERE and MARIA SANTOS, individually and on behalf of all others similarly situated, Plaintiffs, v. THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK; GERTRUDE E. UNSER, individually and in her capacity as Chairman of the Board of Examiners; JAY E. GREENE, MURRAY ROCKOWITZ and PAUL DENN, individually and in their capacities as members of the Board of Examiners; MURRY BERGTRAUM, individually and in his capacity as President of the Board of Education; ISAIAH E. ROBINSON, JR., individually and in his capacity as Vice-President of the Board of Education; MARY E. MEADE, SEYMOUR P. LACHMAN, and JOSEPH MONSERRAT, individually and in their capacities as members of the Board of Education HARVEY B. SCRIBNER, individually and in his capacity as Chancellor of the City School District of the City of New York; and FREDERICK H. WILLIAMS, individually and in his capacity as Executive Director of the City School District of the City of New York, Defendants.	CIVIL ACTION No. 70 Civ. 4141 ANSWER

Defendant Board of Examiners, by its attorneys, KAYE, SCHOLER, FIERMAN, HAYS & HANDLER, for its answer to the Amended Complaint herein respectfully alleges:

1. Lacks knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 1 of the Complaint.

2. Lacks knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 2 of the Complaint, except specifically denies that this action is properly maintainable as a class action under Rule 23 of the Federal Rules of Civil Procedure.

3. Lacks knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 3 of the Complaint.

4. Lacks knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 4 of the Complaint, except specifically admits that plaintiffs Boston M. Chance and Louis C. Mercado are eligible to take a supervisory examination.

5. Lacks knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 5 of the Complaint, except specifically denies that a legally-recognizable class exists.

6. Lacks knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 6, except specifically denies that any legally-recognizable class exists, specifically denies the existence of discrimination, and specifically denies that any examination heretofore administered by the Board of Examiners is invalid.

7. Lacks knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 7, except specifically denies that any legally-recognizable class exists, and except admits that plaintiffs Boston M. Chance and Louis C. Mercado are presently serving as acting principals, that both are eligible to take

the examination for principal, elementary school, and that plaintiff Chance has taken and failed one previous supervisory examination.

8. Denies each and every allegation contained in Paragraph 8, except admits that plaintiff Chance has been employed in the pedagogical services of the New York City public school system for the past 15 years, is black, is an acting principal of Public School 104, an elementary school in the Bronx, possesses the educational and experience qualifications established by the Board of Education and the Chancellor to take the examination for the position of principal, elementary school, and that plaintiff Chance does not possess the requisite New York City license to be appointed a principal, except lacks knowledge or information thereof sufficient to form a belief as to whether or not plaintiff Chance holds a New York State principal's certificate.

9. Denies each and every allegation contained in Paragraph 10, except admits that plaintiff Mercado has been employed in the pedagogical services of the New York City public school system for 12 years, is acting principal of P.S. 75, an elementary school in Manhattan, possesses the educational and experience qualifications established by the Board of Education and the Chancellor to take the examination for the position of principal, elementary school, and that plaintiff Mercado does not possess the requisite New York City license to be appointed a principal, except lacks knowledge or information thereof sufficient to form a belief as to whether or not plaintiff Mercado holds a New York State principal's certificate.

10. Lacks knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 10 (a), except admits that plaintiff Clara Burgess is black, has been an employee of the New York City public school system for 17 years, and is a candidate in the most recent examination for the New York City license of elementary school principal, the written portion of which was given on November 3, 1970.

11. Lacks knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 10 (b), except admits that plaintiff Faith Ringgold is black, has been an employee of the New York City public school system for 15 years, is presently a teacher of art at Brandeis High School, and that she failed the examination for the New York City license as supervisor of art which commenced in March, 1968.

12. Lacks knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 10 (c), except admits that plaintiff Shirley Randall is black, has been an employee of the New York City public school system for 15 years, is presently a teacher of retarded children at the Bronx Occupational Training Center, and is a candidate in the most recent examination for the New York City license for supervisor in the Bureau of Children of Retarded Mental Development, the written portion of which was given in June, 1970.

13. Lacks knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 10 (d), except admits that plaintiff Maria C. Cestero is Puerto Rican, has been an

employee of the New York City public school system for approximately 14 years, is presently acting principal of P.S. 120, an elementary school in Brooklyn, failed the examination for license of assistant principal, Junior High School, which commenced in September, 1968, and is a candidate in the most recent examinations for the New York City licenses for elementary school principal, the written portion of which was given November 3, 1970, and for assistant principal, High School administration, the written portion of which was given December 29, 1969.

14. Lacks knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 10 (e), except admits that plaintiff Edward Bonnemere has been an employee of the New York City public school system for 15 years, is presently a teacher of music at I.S. 55, in Brooklyn, and that he failed the examination for the New York City license of Chairman of Music, Junior High School, commenced December, 1963.

15. Lacks knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 10 (f), except admits that plaintiff Maria Santos is Puerto Rican, has been an employee of the New York City public school system for 17 years, and that she failed examinations for New York City licenses of Chairman, Foreign Languages, Junior High School, and Chairman, Foreign Languages, Senior High School, administered in 1966.

16. Denies each and every allegation contained in Paragraph 14, except admits that defendants Gertrude E. Unser, Jay E. Greene, Murray Rockowitz and Paul Denn are members of the Board of Examiners, and admits that the Board

of Examiners exists and has powers pursuant to the New York Education Law, Section 2569 (1) and Section 2590-j (3)(a)(1), and refers thereto for the provisions thereof.

17. Lacks knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 15.

18. Lacks knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 16, except admits that to obtain an appointment to any supervisory position, an individual needs an appropriate New York City license; that such licenses are issued by the defendant Board of Education only to persons who meet qualifications that it and the Chancellor have established as required by law and who have passed an examination prepared and administered by defendant Board of Examiners; that such licenses are in addition to other State requirements for supervisory positions, and that Buffalo, New York, is the only other school district in the State for which the law provides for examinations in addition to State certification.

19. Lacks knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 17.

20. Admits the allegations contained in Paragraph 18 of the Complaint, except denies the relevance thereto of Board of Education by-law 101 (3).

21. Lacks knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 20.

22. Denies each and every allegation contained in Paragraph 21.

23. Denies each and every allegation contained in Paragraph 22.

24. Denies each and every allegation contained in Paragraph 23, except admits that all such testing procedures contain written and/or oral portions.

25. Lacks knowledge or information thereof sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 24, except denies that the Board of Examiners' examinations are in any way discriminatory.

26. Denies each and every allegation contained in Paragraph 25.

27. Denies each and every allegation contained in Paragraph 26, except admits that Article V, Section 6 of the New York State Constitution, and Section 2590-j (3)(e)(1) of the New York Education Law are applicable to the Board of Examiners, and refersthereto for the provisions thereof.

28. Denies each and every allegation contained in Paragraph 27, except admits that the Board of Examiners acts pursuant to Section 2569 (1) of the New York Education Law, and refers thereto for the provisions thereof.

29. Denies each and every allegation contained in Paragraph 28, except admits that Section 2573 (10) of the New York Education Law is applicable to the Board of Education, and refers thereto for the provisions thereof.

AS A FIRST, COMPLETE, AFFIRMATIVE DEFENSE

30. The court lacks jurisdiction over the subject matter of the Complaint.

AS A SECOND, COMPLETE, AFFIRMATIVE DEFENSE

31. The Complaint fails to state a claim against defendant upon which relief can be granted.

AS A THIRD, COMPLETE, AFFIRMATIVE DEFENSE

32. Each and all of the plaintiffs lack standing to bring the Complaint herein.

AS A FOURTH, COMPLETE, AFFIRMATIVE DEFENSE

33. Each and all of the plaintiffs have failed to exhaust available state remedies.

WHEREFORE, defendant denies that plaintiffs are entitled to the relief prayed for in the Complaint as amended, or any part thereof, or to any relief against this defendant, and defendant prays that the Complaint as amended be dismissed with costs to defendant.

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

By _____
A Member of the Firm
Attorneys for Defendant
Board of Examiners
Office and Post Office Address
425 Park Avenue
New York, New York 10022

Board of Examiners' Notice of Motion dated June 1, 1972, together with supporting affidavit of Murray Rockowitz (plus exhibit), sworn to June 1, 1972

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

45a

- x

BOSTON M. CHANCE, et al.,

Plaintiffs,

-against-

THE BOARD OF EXAMINERS, et al.,

Defendants.

- x

NOTICE OF MOTION

Index No.
70 Civ. 4141

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Murray Rockowitz, sworn to June 1, 1972, and upon the pleadings and all other papers and proceedings had herein, and pursuant to the preliminary injunction dated September 17, 1971 and filed September 20, 1971 of the Hon. Walter R. Mansfield, of the United States Court of Appeals, sitting by designation in this Court, the undersigned will move before Judge Mansfield in this Court, at the United States Courthouse, Foley Square, New York, New York at a date and time to be set down by this Court, for a modification of said preliminary injunction in order to permit further examinations for supervisory positions, and the promulgation of lists, issuance of licenses, and making of appointments based thereon.

Dated: New York, New York
June 1, 1972

Yours, etc.,

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
Attorneys for Defendant
The Board of Examiners

By _____
A Member of the Firm

425 Park Avenue
New York, New York 10022
759-8400

TO:

Elizabeth B. DuBois, Esq.
Attorney for Plaintiffs
10 Columbus Circle
Suite 2030
New York, New York 10019

J. Lee Rankin, Esq.
(Leonard Bernikow, Esq.)
Corporation Counsel
Municipal Building
Foley Square
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

BOSTON M. CHANCE, et al.,

Plaintiffs,

-against-

THE BOARD OF EXAMINERS, et al.,

Defendants.

- x

AFFIDAVIT

Index No.
70 Civ. 4141

STATE OF NEW YORK)
) ss.:
COUNTY OF KINGS)

MURRAY ROCKOWITZ being duly sworn, deposes and says:

1. I am Chairman of the Board of Examiners of the Board of Education of the City of New York, and am one of the defendants herein. I submit this affidavit in support of defendant Board of Examiners' application for a modification of the preliminary injunction entered on September 20, 1971.

2. The Board of Examiners is applying for modification of the aforesaid preliminary injunction, pursuant to the express provisions of the last paragraph thereof, in order to permit it to perform its statutory function with regard to the preparation and administration of examinations for supervisory licenses. In proposing a revision of its procedures, the Board of Examiners does not concede that its prior procedures were or are inadequate or that they resulted in discrimination against any individual or class. Rather, the Board of Examiners proposes to modify its procedures in order to achieve maximum acceptance by the total community which it

serves and to improve the compatibility of the Board's procedures with the decentralized school administration.

3. The proposal would establish new procedures in a comprehensive supervisory license assessment program. These new procedures fall into four basic areas--job analysis, job-related examinations, scoring and reporting of results, and validation of examinations--the details of which are more fully set forth in the text of the proposal which is annexed hereto as Exhibit A.

4. The proposed new procedures were developed by the Board of Examiners after consultation with a number of experts who brought to the deliberations expertise in a variety of areas, including psychometrics in education and in industry, development and administration of teacher and supervisory educational preparation programs, analysis of teacher and supervisory behavior in the school setting, and knowledge of the current status and thinking of minority groups with respect to testing in general and testing for teaching and educational supervisory licenses in particular. Those experts participating in the intensive consultation meetings included:

Dr. Roscoe C. Brown, Jr., Professor of Education and Director of the Institute of Afro-American Affairs, New York University

Dr. Harry Gilbert, Professor, School of Education, and Coordinator of Urban School Psychology Programs, Fordham University

Dr. Nathan Jaspen, Chairman, Department of Educational Statistics, New York University

Dr. Gerhard Lang, Chairman, Department of Educational Research and Professor of Psychology and Education, Montclair State College, Montclair, New Jersey

Dr. Robert Linn, Head of the Department of Research and Development, Educational Testing Service, Princeton, New Jersey

Dr. Frederick J. McDonald, Chairman, Teacher Behavior Group, Educational Testing Service, Princeton, New Jersey

Dr. Joseph L. Moses, Psychologist, American Telephone and Telegraph Company

Dr. [illegible]t D. North, Associate Director, Professional Examinations Division, Psychological Corporation, New York, New York

Dr. Benjamin Rosner, University Dean, Teacher Education, City University of New York

Dr. Marvin Sontag, Associate Professor of Psychology and Education, Teachers College, Columbia University

Dr. Robert L. Thorndike, Richard March Hoe Professor of Psychology and Education, Teachers College, Columbia University

Dr. E. Belvin Williams, Associate Dean for Administration, Teachers College, Columbia University (formerly Northeast Regional Chairman of Association of Black Psychologists)

5. The Board respectfully submits that its proposal is consistent with the principles laid down in the Court's Opinion dated July 14, 1971.

Murray Rockowitz
Murray Rockowitz

Sworn to before me this
1st day of June, 1972

Edward W. Pape
Notary Public
EDWARD W. PAPE
Commissioner of Deeds - No. 4-343
City of New York
Certificate filed in Kings County
Commission Expires Sept. 1, 1973

EXHIBIT "A"

Board of Examiners' Proposal for Modification of Supervisory Examination Procedures

The proposal deals with procedures in a comprehensive supervisory license assessment program in four areas: job analysis; job-related examinations; scoring and reporting of results; validation of examinations.

I. Job Analysis

Step 1. The Board of Examiners will develop job analyses for each position for which it is required to conduct examinations. The job analysis will be based on a determination of the job behaviors which include the tasks the person is called upon to perform, the amount of time devoted to these tasks, their relative importance, and the knowledge and skills which enable a person on the job to perform these tasks successfully. The proposed procedure should be viewed as a model for analysing all jobs although specific procedures might differ for specific jobs. As a general rule, the job analysis will be developed from data which will be accumulated in the following way:

A. Members of the staff of the Board of Examiners will observe incumbents in the position to obtain a representative sampling of their daily work. Three visits will be made to the schools over a three-month period to insure that the description of their tasks is complete. To insure that the analysis is representative of the broad population in the City of New York, the sampling will include incumbents in schools located in districts of varying

socioeconomic levels.

B. Observed incumbents will be asked to keep a log of their activities over the entire period during which the description will be developed so that critical incidents can be obtained.

C. Incumbents' logs will be compared with the sampling of behaviors observed in (A) above. The incumbent's supervisor will evaluate the log to determine whether the stated behavior contributes to effective performance. The job analysis will incorporate the results of the observed and reported data.

D. The Chancellor and Community Superintendents will be consulted as to their perception of the job. Such perceptions shall be considered in the development of the job description.

E. Finally, in developing the job analysis, findings of research in the license area involved will be taken into account.

F. The ultimate description will include a list of the tasks the incumbent must successfully accomplish, the kinds of actions he must take, and the knowledge and skills necessary to accomplish the tasks involved.

Step 2. The job description will be analysed to determine the relative importance of identified qualities and behaviors. A determination will then be made of appropiate techniques to measure the important elements. For example, if knowledge of a foreign language were found to be a critical element of the job, an appropriate technique to measure language proficiency would be prescribed.

II. Job-Related Examinations

Job-related tests will be created by closely matching the tests and test tasks to the important elements of behavior on the job as identified in the job analysis. The job analysis will be reviewed and selected behaviors listed will be translated into test tasks. The sampling of test tasks will reflect in microcosm the complex conditions of the job itself. Some of these may lend themselves to pencil and paper tests, others to interviews, and still others to simulation. Each test item in a written test and each test, be it interview or simulation, will be identified by a code referring to a specific item in the job analysis. This cross reference system will insure that test tasks used will be based on the job analysis.

Illustrative of testing techniques that will be used, where appropriate, are the following:

The in-basket test is a simulation which approximates on-the-job administrative requirements. It uses a hypothetical but realistic in-basket containing letters, memoranda, records of in-coming telephone calls and other documents normally found in the in-basket of the school administrator. The applicant is given the necessary background information concerning the school in which, as principal, he would be faced with the specific in-basket. He is told that he is the incumbent principal and that he must respond to the materials as he would actually on the job by

(a) handling certain matters himself immediately

(b) handling others himself at a later time

(c) delegating some to staff for immediate action and

(d) delegating others to staff for later action. After a period of study of the documents, he may be asked in an interview to give the reasons for the decisions he has made in handling the in-basket and to defend them.

Another type of simulation involves supervision of classroom instruction. In a test of supervisory ability, that is, the ability to observe a 30-minute lesson and help the teacher improve it, the applicant observes either an actual lesson or a videotape thereof and evaluates the lesson for a panel of experts to whom he presents his program for improving the teaching of the lesson viewed.

Another type of simulation may involve human relations problems. Videotapes will be shown candidates who will then be asked to play the role of the supervisor involved in the tape with an indication of how the problem could be handled. Such problems might involve a teacher who has just reported that a student in his class is a drug user or a parent who is complaining that his child has been "shaken down" for money in the lunchroom.

Still another form of examination which the Board will use, where appropriate, as part of the total assessment is the conference test. In this test the applicant is called upon to conduct a conference to which interested and knowledgeable parties have been summoned. A realistic problem is presented and, under the leadership of the applicant, the group seeks to achieve a goal based on the discussion of the issues in the conference. For example,

a conference test for the position of Director of Art would involve art supervisors and teachers, art experts from the field and others interested in the problem. The topic, chosen from the subjects of conferencesactually conducted by a Director of Art, might be: "How shall the curriculum be revised to enhance appreciation of ethnic contributions to art?"

Other types of simulations and tests will be developed as appropriate depending on the job analysis. In every instance, the test task, be it written response, interview, or simulation, would be carefully cued to the job behaviors arrived at from the job analysis made.

III. Reporting of Results

In the past, specific weights were attached to each one of the battery of tests with a few exceptions (written English, physical and medical, and record were rated either satisfactory or unsatisfactory). A candidate had to achieve a weighted average of 60 per cent on the battery of tests to pass. If a candidate scored less than 50 per cent on any part of the examination, he was eliminated If he obtained 50 per cent or more, he was continued in the examination but he had to compensate for marks lower than 60 per cent because he had to achieve a weighted average of 60 to pass.

Under the proposal, results of testing will be reported in a completely different manner than heretofore. Instead of a composite grade, a profile of performance will be made available to the City Board or to Community School Boards, whichever has jurisdiction, for each qualified

candidate. This profile will present an assessment of the performance of each qualified candidate in all tests without specific weight and without exact numerical grades.

The assessment will consist of a report on the various areas tested as previously determined by the job analysis. For example, the assessment of a candidate in a principal's examination might report on the following areas:

(1) managerial abilities; (e.g. handling of a variety of problems by proper organization, planning, imagination and decision-making;

(2) supervisory abilities; (e.g., competency to observe classroom teaching insightfully and to contribute to the improvement of teacher performance);

(3) interpersonal relationships; (e.g., communications skill, sensitivity to the role of participants in a crisis situation, awareness of the human factors operative in a school setting).

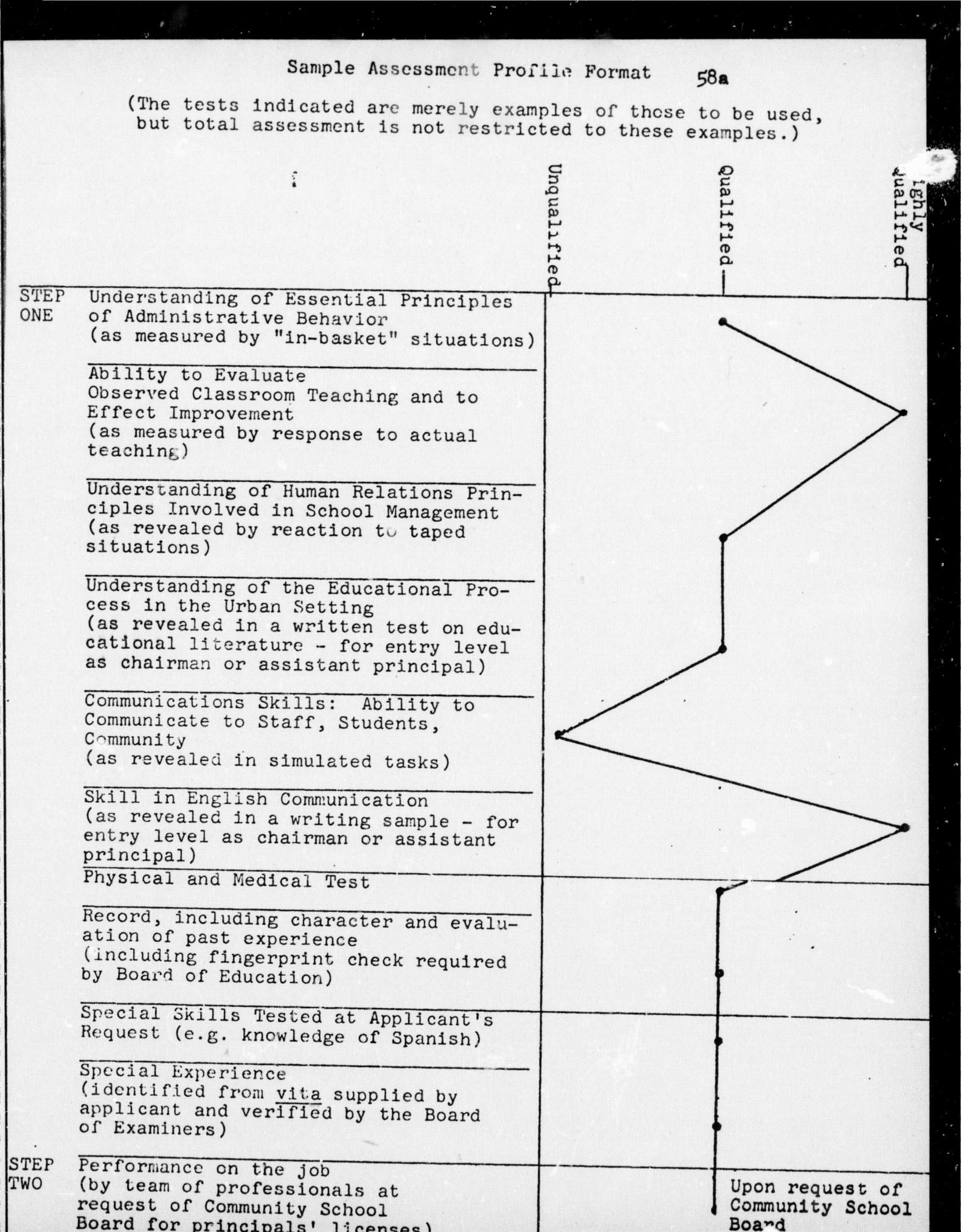
The assessment will be made by examiners chosen for their expertise in a given part of the assessment. Thus, in evaluating performance on an administrative in-basket, examiners will be drawn from a pool of experienced administrators in education and industry who will have participated in the job analysis or who will be familiarized with the administrative component of that analysis. They will develop a scoring guideline that will identify the significant elements in the in-basket and levels of minimum acceptable performance in the interview based on the guideline.

Similarly, in a supervisory simulation, standards would be set by pooling expert opinion of those who had wide experience in supervising instruction in a variety of schools and who were thoroughly familiar with the content and methodology of the curriculum areas involved. They would view a representative videotaped lesson, develop a scoring guideline in which they would identify significant areas of strength and weakness in the performance of the teacher conducting the lessons and specific ways in which that performance could be improved. The candidate would appear before one of a number of panels consisting of school supervisors and university professors in the specific subject area and would evaluate the lesson and present a program he would seek to implement to improve the teacher's performance. Again, the pooled judgment of the experts would be the basis for establishing the level of minimum acceptable performance.

A sample profile format follows on the next page.

Sample Assessment Profile Format

(The tests indicated are merely examples of those to be used, but total assessment is not restricted to these examples.)



It can be seen from this sample profile that, though the candidate is qualified overall, he is unqualified in one of the areas tested. In the event that the total performance of the applicant results in a rating of "unqualified" in two or more areas, he would be rated unqualified and not recommended for licensing and a place on the qualifying list. Upon receipt of the list of qualified eligibles, together with their assessment profiles, each Community School Board could evaluate the indicated achievement levels of each eligible in the light of its own needs,attaching more importance to some aspects of the total assessment and less importance to others. Thus, a candidate who did poorly in English communication but well in administration and supervision might be more acceptable to one Community School Board than to another. Another aspect of the profile would be the evaluation of additional skills claimed by the applicant; thus, an applicant who claimed fluency in Spanish would be tested for that skill and this additional qualification will be reported together with the other aspects of his assessment .

The Board of Examiners would undertake to provide a manual to help Community School Boards interpret the results reported and would consult upon request with any Community School Board in matters of personnel selection. Further, in the case of certain supervisory positions, the Board would provide additional assessment service. Each Community School Board could submit to the Board of Examiners a list of qualified persons in whom they were interested for such a supervisory position, for an

assessment of their performance in the job they currently hold. The Board of Examiners would evaluate by an on-the-site inspection by a team of experts each eligible as to performance in his current job and submit a report of its findings to the Community School Board. (Practical considerations of cost and availability of experts preclude performance evaluation of all eligibles in some examinations involving large numbers of applicants).

The assessment program described above will continue the same safeguards that are currently in effect, namely, the right of the applicants to full disclosure of the guidelines used in the assessment process with the right to appeal from any or all of the findings.

IV. Validation

The examinations will seek to achieve content validity, meaning that they will reflect a proper sampling of a specified universe of content. In the case of supervisory examinations, the "universe of content" is a sampling of test tasks that are related to significant elements of the job analysis. If they measure whether the candidate has the skills and knowledge required by the job, then the examination is content valid. Thus, validity is tied to the job analysis in that the purpose of the test is simply to determine whether a candidate has the skills and knowledge to do the specific job. Since it is impossible to use the entire "universe of content", the sampling must be sufficient to insure that important duties are covered.

To accomplish this objective, panels will be convened to review the sampling of test tasks to insure that it is adequate and related to significant elements of the job analysis. These panels will be different from those who constructed the examination and will consist of professionals who have thoroughly familiarized themselves with the job analysis.

The Board has considered the possibility of evaluating examinations in terms of so-called "predictive validity," i.e., predicting how well candidates will perform on the job. The Board's conclusion is that such validation procedures are not technically feasible in this context at this time. The kind of empirical investigation necessary to establish predictive validity of examinations for principal, for example, would require placing those who failed the examination in the position of principal and evaluating their performance on the job as compared with their performance in the assessment. This procedure entails risks for the pupils who attend the school which are unacceptable.

Nevertheless, the Board proposes the following additional procedures designed to improve content validity which over a period of time will make its exams more useful in predicting successful performance.

An on-the-job performance evaluation by the Board of Examiners will be made of a sampling of supervisors qualified through tests conducted under procedures outlined in this proposal, who have been on the job for a two-year period. A team of professionals with no knowledge of the

assessment results will visit the school where the supervisor has been serving to conduct the evaluation. The performance criteria to be used will be developed from job behaviors evidenced by a sampling of supervisors and administrators now performing satisfactorily on the job as reported by their rating officers - principals and superintendents. In addition, feedback will be sought from the Community School Boards as to their evaluation of the performance of the appointed eligibles.

The two sets of data obtained - those from the visiting panel of experts of the Board of Examiners - and those from the rating supervisors and Community School Boards -- will be compared with the original assessment profile of each eligible as developed from test performance. These comparisons will make available data enabling improvement of the assessment program because those test tasks which correlate best with performance on the job will be retained and those correlating worst will be modified or dropped. The result would be an assessment program with continually improved validity. The development of test tasks in an assessment program that correlate positively with performance on the job would represent the optimum in content validity.

CONCLUSION

This proposal represents a conscientious effort on the part of the Board of Examiners to take a hard look at its procedures and to make them more flexible and adaptable to the Community School Board type of administration. It does so without abandoning the essential elements of a merit system which protects the rights of all applicants.

Most important it takes cognizance of the needs of the ultimate beneficiaries of this action, the children in the varied communities of New York City.

Plaintiffs' Response to the Board of Examiners' Notice of Motion dated June 1, 1972, together with supporting affidavit of Elizabeth B. DuBois and exhibit

EDITH M. CLARKE, et al.,

Plaintiffs.

- against -

THE BOARD OF EXAMINERS, et al.,

Defendants.

PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTION OF DEFENDANTS

Index No.
70 Civ. 4141

TO THE HONORABLE WALTER R. MANSFIELD:

While plaintiffs are faced with some uncertainty, on the basis of the papers served upon them in connection with this notice of motion, as to exactly what is being sought from the Court by the defendants Board of Examiners, it is clear that the motion must be denied. To the extent that the defendants propose to engage in research which will result in the development of a system of examinations for school supervisory positions in the City of New York which are job-related and which have a greater measure of validity than those examinations whose use has been enjoined by the Court, there is nothing in the existing preliminary injunction which could be construed as preventing the taking of such action. To the extent that the motion seeks judicial approval, at this time, of the administering of examinations, the promulgation of lists, the issuance of licenses, and the making of appointments on the basis of such examination, when they do not yet exist and are the subject of only a vague and wholly prospective plan, it is, we submit, quite outside the contemplation of the final paragraph of the Court's order of September 17, 1971. Moreover, while we will not detail at this time the deficiencies of the proposal, we must note that it indicates an inability or unwillingness on the part of the defendant Examiners to develop a system which will eliminate, to the extent possible, the constitutional

deficiencies found by this Court and by the Court of Appeals.

By the terms of the preliminary injunction of this Court dated September 17, 1971 and filed September 20, 1971, as based on the findings of fact and conclusion of law filed July 14, 1971, the defendants are enjoined from: (1) conducting further examinations for supervisory positions or from processing examinations already given; (2) promulgating eligible lists or issuing licenses on the basis of exams already given; (3) making appointments on the basis of lists already promulgated and (4) are ordered to develop an interim system to permit appointments on an acting basis to fill existing vacancies in the school system. Nothing in this order has the effect of preventing the defendants from developing a new examination system in accordance with the proposal attached to the instant motion or such other method as may seem desirable to them. Indeed, the final paragraph of the order, upon which the present motion purports to be based clearly contemplates that some new system will be developed during the pendency of the injunction. What that final paragraph does not contemplate, and where consequently the present motion is not in compliance with it, is the submission of a wholly prospective and unilaterally developed proposal for the development of tests which will, before they are even conceived, be given a judicial stamp of approval as to their constitutionality. The order explicitly states that no application for modification may be made until "all essential relevant data with respect thereto" have been made available to all parties and such parties have had the opportunity to comment upon and confer with the party seeking the modification in order to reach a result which will, as nearly as possible, be acceptable to all concerned.* In this

* The Court's memorandum accompanying the injunction strongly urges the plaintiffs to cooperate in the development of such

regard, plaintiffs note that they were not consulted with regard to this proposal prior to its submission to the Court and have thus had no opportunity to provide any input into its formulation.* We are advised also that the other defendants, the Chancellor and the Board of Education, had no role in the development of this proposal. Plaintiffs are now, and have always been, willing to meet with the defendants in order to assist in the construction of a system to replace that which the Courts have found invalid. More importantly, however, this proposal does not, we submit, constitute the "all essential relevant data" referred to in the order. Such data must include, for example, but without exclusion, the job analyses which the proposal contemplates, the methods by which test items are derived from the job analysis, the studies of validity to which those test items have been subjected, and evidence regarding the racial and ethnic impact which the new test items have.

We of course recognize the concern of the defendants that they may be put to the time and expense of developing a system which will be found lacking by the Court and which will thus have to be discarded. We think that it was just that concern which led the Court to urge the parties to cooperate in the construction of a new examination program. We do not think, however, that such concern can justify the seeking or the granting of judicial approval to a system which does not yet exist. If the defendants, as they justifiably may, wish some assurance that this work will not be for naught, we think that some method may be arrived at to accomplish that end without, however, binding the Court or the plaintiff irrevocably to the product of

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* See attached affidavit of Elizabeth B. DuBois.

that work. For example, the Court may wish to appoint a special master, a panel of experts, or an appropriate organization, agreeable to the parties, to supervise the development of the contemplated replacement system.

In view of our response to the procedure of the instant motion as just explained, we think it inappropriate to comment in detail on the substance of the proposal attached to it.* We do wish to emphasize our deep concern with the total exclusion from the proposal of any reference to the racial and ethnic impact of the examinations which are to be developed. We are unable to consider acceptable any examination system which has not been designed to eliminate to the greatest degree possible such unconstitutional bias. We also find the Board's rejection of any kind of empirical validation prior to implementation (p.11) unacceptable and inconsistent with legal and professional standards. The guidelines on testing of the Equal Employment Opportunities Commission, which are now applicable to employment by local governments, Equal Employment Opportunity Act of 1972, 86 Stat. 103, Pub. L. 92-261 (March 24, 1972) contains recommendations for making such studies in situations at least as complex as that involved here, and the proposal of the Educational Testing Service submitted to the parties in December, 1971, proposed a method of concurrent validation.**

Plaintiffs reiterate that we are willing and anxious to meet with the defendant Board of Examiners as well as the other defendants, and such other concerned parties as may be considered appropriate, to discuss the development of an examination system to replace that whose use has been enjoined. For

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* Should the Court consider some modification at this stage appropriate, plaintiffs request the opportunity to submit full evidence, at a hearing or otherwise, regarding the development of a new examination system.

** See attached affidavit and exhibit.

the reasons stated, however, we think that the present motion of the defendants is inappropriate and premature, and should therefore be denied.

Respectfully submitted,

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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- -x

BOSTON M. CHANCE, et al.,

Plaintiffs,

- against -

THE BOARD OF EXAMINERS, et al.,

Defendants.

- -x

AFFIDAVIT

Index No.
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STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ELIZABETH B. DUBOIS being duly sworn, deposes and says:

1. I am one of counsel for plaintiffs and am fully familiar with past proceedings in the above captioned action.

2. On June 1, 1972, plaintiffs' counsel were served with a copy of defendant Board of Examiners' Notice of Motion for a modification of the preliminary injunction.

3. Plaintiffs' counsel received no prior notice, written or oral, of defendant Examiners' intention to file said Notice, nor have they received any of the data or information referred to in the last paragraph of the court's order of September 17, and pages 4-5 of the court's supporting Memorandum Regarding Preliminary Injunction.

4. The only communications plaintiffs' counsel have received from defendant Examiners with respect to modification of the order took place in November and December of 1971, while the appeal from the preliminary injunction was pending in the Court of Appeals.

5. During that period plaintiffs' counsel met with counsel for the Examiners and with members of the Board of

Examiners in an attempt to reach an agreement as to the development of new supervisory examination procedures.

6. At that time, as now, the Examiners indicated that they had consulted with a number of experts including two [illegible] of the Education Testing Service of Princeton, New Jersey (hereinafter E.T.S.), Dr. Frederick J. McDonald, Chairman, Teacher Behavior Group, and Dr. Robert Linn, Head of the Department of Research and Development.

7. In the course of their discussions, the parties consulted with E.T.S. with respect to the role that organization might play in assisting in the development of non-discriminatory and job-related supervisory examination procedures, as a result of which, E.T.S. was asked to submit a proposal for the development of a prototype supervisory examination system.

8. E.T.S. submitted such a proposal (attached hereto as Exhibit 1), with respect to one kind of supervisory position and on December 27, 1971, the parties met with an E.T.S. representative to discuss the proposal. At that meeting E.T.S. was asked to revise its original proposal so as to include a prototype of another kind of position as well as to make certain minor revisions. However, no such revised proposal was ever submitted, apparently because of instructions from the Examiners.

9. The E.T.S. draft proposal which was submitted indicates clearly that the development of a non-discriminatory and job-related system is a lengthy and complicated process and that the nature of the system ultimately developed could not now be determined (see pp. ii, 3,7-8, infra.).

10. A comparison of the E.T.S. proposal with the proposal of the defendants accompanying the present Motion, indicates some of the deficiencies and inaccuracies in the latter. For example, the E.T.S. proposal emphasizes the goal of making the new system non-discriminatory (pp. ii, 1,5.). Further, the E.T.S.

proposal shows that empirical validation, which rests on a demonstrated correlation between test and job performance, is not only feasible but considered by professionals in test technology as a necessary preliminary to use of an examination (see ¶, 7-8, infra.). The proposal specifically indicates the feasibility of concurrent validation (p. 4) while the Examiners conclude in their current proposal that anything other than content validation was not feasible. Additionally the E.T.S. proposal provides for an Advisory Board to review the development of the new examination system.

11. The E.T.S. proposal reveals that substantial progress had been made in arriving at some agreement with respect to a new examination system which might be both non-discriminatory and job-related. Plaintiffs' counsel have been willing at all times and are now willing to pursue the discussions initiated in November and December. It would be both appropriate and useful that we meet not only with the newly constituted Board of Examiners* but also with the Board of Education and the Chancellor who although parties to the lawsuit ultimately responsible for the operation of the City School System, and intimately involved in developing and administering the interim system for the selection of acting supervisors, were not involved in the earlier discussions with respect to the development of a new supervisory examination system, and had no role in the devising of the present proposal.

Elizabeth B. DuBois

Sworn to before
me this day
of , 1972.

* Two new members of the Board have recently been nominated by the Chancellor.

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MS. DUBOIS
MR. GREENE
MR. SCHAPIRO
MR. ROCKOWITZ

Subject: Proposal to N.Y.C.

From: Frederick J. McDonald

Date: December 21, 1971

Attached is a copy of the draft of our proposal. After I have discussed this draft on December 27th, I will prepare a final copy.

I have omitted the budget, but will bring a preliminary draft to the meeting on the 27th. The final draft will include Appendices and vitae of the personnel who will work on this project.

This draft copy omits points that I think should be discussed among the parties involved before and if they are to be included in the proposal. Please keep this in mind as you read the proposal.

Exhibit 1

This document describes the general methods and work plan to be used by ETS to develop a prototype assessment system for the selection of candidates for an administrative position in the New York City Schools. It was thought to be unnecessary to describe these procedures in detail since they are well known.

It is impossible to predict in this proposal the exact character of the assessment system to be developed. Rather, the proposal describes the empirical methods that will be used and out of which an assessment system will evolve.

The proposal commits the developers, ETS, only to create a system that is non-discriminatory and job relevant. There is reason to be optimistic that the plan described here is likely to produce such a system.

INTRODUCTION

This paper describes a plan for developing a prototype assessment system for selected administrative or supervisory examinations to be used by the Board of Examiners of New York City. The purpose of developing this prototype is to create a model of an assessment system that is job relevant and non-discriminatory where job relevance is the primary criterion but where its application does not systematically or inadvertantly exclude individuals on the basis of race, sex, religion, and other non-merit factors. "Job-relevant" means that the assessment procedures will identify those individuals who have the knowledge, skills, and personal characteristics which can be shown to be directly related to effectiveness in the position for which a selection is being made. "Non-discriminatory" in this instance means that the assessment system will select or reject members of ethnic groups in proportion to their numbers in the applicant group.

"Prototype" means an assessment system which may be used as a model for developing evaluation procedures for selecting individuals for other positions, and which when approved may be used in the examination system of the Board of Examiners.

The product of the plan proposed here will be: 1) a description of the knowledge, skills, and personal characteristics required for the position for which the assessment system is being developed; 2) a description of the criteria local boards will use in choosing among candidates for the position; 3) a set of assessment procedures or techniques; 4) alternative plans for using these procedures so that they will provide the information the local boards need to make selections; 5) data on the non-discriminatory, job-relevance, and other psychometric characteristics of the alternative procedures; 6) cost estimates for the use of the procedures; 7) a set of

effectiveness of the procedures in selecting successful administrators or supervisors.

Tasks and Methods

In this section we describe the tasks to be accomplished and the methods to be used in accomplishing them. Later sections describe the time schedule of the plan and the personnel who will work on this project.

Job Analyses: Extensive job analyses will be made of the position in selected school districts. The following methods will be used:

1) ETS staff will follow the incumbents of the position through their daily routine to determine the nature of their work. A sample of days over a two month period will be drawn to select the days on which ETS personnel will be present. ETS personnel will "follow" the incumbent of the position through his or her daily schedule (with minimum interference with the incumbent's duties), being present in as many situations as is possible without interfering with confidentiality in interpersonal relations or accomplishment of the task at hand.

The person being observed will be fully informed of the nature and purpose of this activity and will be encouraged to be co-worker of the observors. They will be asked about their choice of methods to cope with the problems that arise and the bases of their decisions.

2) An analysis will be made of all the correspondence, telephone calls, and face-to-face requests made of the incumbent. When these materials and conversations are confidential, the incumbent will be asked to summarize their content and his decisions and actions.

3) The incumbents will be asked to keep a log of their activities during the periods when ETS staff are not present.

4) An analysis will be made by ETS personnel of the legal, policy, and procedural statements governing the position being studied.

5) ETS personnel will make an analysis of documents describing what the position "ought" to be.

6) ETS personnel will interview teachers, community superintendents, community board members, and representatives of major educational organizations such as organizations of school administrators and parents' groups about their perceptions of what the position requires and the characteristics the incumbent ought to have.

A description of the position will be drawn from these observations and analyses. This description will include a list of the tasks the incumbent must successfully accomplish, the decisions he must make, the characteristic actions or methods he must use, the knowledge, skills, and personal traits presumed to be required to accomplish the tasks, make the required decisions, and successfully execute the actions needed to solve the problems the incumbent will face.

This description will be used to specify the characteristics of the assessment system to be developed.

Test Development: It is impossible to specify in this proposal the exact nature of the testing techniques that will be used and the assessment system that will be proposed. It is expected that the techniques will include a wide range of procedures such as paper and pencil tests and performance tests. It is to be understood, however, that greater effort will be given to the development of techniques that measure ability to perform effectively in the position. It should also be understood that the system developed will use a variety of procedures which will be included only if they can be shown to be correlated with effectiveness in the position.

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The assessment system will [illegible] through which the candidate will pass. His performance on each phase will be appropriately weighted; and his weighted scores will be presented in a profile.

Test Try-Out: Each of the procedures developed will be administered to a sample of candidates. The samples will be determined in the course of the work on this project. It may be assumed that the size of these samples will vary; for example, if a paper and pencil test is developed for a first phase, a large number of candidates will take it.

Test Validation: The procedures developed will be validated by testing a sample of current incumbents of the position who will be rated on successful job performance. Performance on each procedure will be correlated with measures of on-the-job performance.

Advisory Board

ETS will request individuals knowledgeable about the position and the problems of New York City schools to serve in an advisory capacity to the project staff. This Advisory Board will recommend problems to be anticipated and procedures to be followed in the development of the assessment system. The Board will review progress and final reports.

The Advisory Board will meet in the first month of the project. At this time the Board will be presented the sampling plan for selecting districts and schools within which the job analyses will be made, a description of the work plan for conducting the job analyses, and a description of the staff and an opportunity to them. The Board will be asked to discuss the problems to be anticipated in conducting the job analyses and interpreting the information that will be gather[illegible]

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Superintendents and Boards will also be presented to the Advisory Board for their review and advice.

The next meeting of the Advisory Board will be held after the job analyses and interviews with Community Superintendents and Boards have been held. ETS personnel will present summaries in the form of job descriptions which state the performances required of the incumbents of the position for which the assessment system is being prepared. The function of the Board will be to make a critical analysis of this description. At this time ETS will also present the specifications for the assessment system which will be reviewed by the Board.

The Board will meet for the third time after pilot forms of the components of the assessment system have been developed. The Board will review these components with specific attention to their relation to the job descriptions developed in the first phase of this project. The Board will be used as a panel of experts to judge the content validity of the components of the assessment system.

The last meeting of the Board will take place when a preliminary draft of the final report is available. The Board will be asked to react to this report by criticizing the analysis and interpretation of the data and the recommendations which will have been made.

The above list of tasks to be undertaken by the Advisory Board suggest the criteria for the selection of its members. The Board must have technical expertise in assessment and evaluation, familiarity with the problems of administering New York City Schools, sensitivity to the social, political, and cultural aspects of the communities and schools of New York City, and commitment to helping to produce an assessment system which is non-discriminatory and job relevant.

The Role of the Community Boards

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We have provided for extensive consultation with the Community Boards and their Superintendents. This consultation will serve three purposes.

First, the Boards and Superintendents will describe the performances and characteristics required for the position being studied as they perceive them. The members of the Boards will be asked what the incumbent should be able to do, and what they see are desirable characteristics for the incumbent to have.

Second, when the desired performances have been described by the processes described above, the Boards and Superintendents will be asked to react to these descriptions and to weigh their relative importance. A description of the criteria and their relative and comparative importance will be prepared from this analysis.

Third, the Boards and Superintendents will be interviewed to determine what information they need to assess the potential of a candidate for a position in their description. They will be asked to review the instruments developed and their scoring procedures to determine if they are likely to provide the information required. From this analysis a description of the information system to be used with the assessment system will be developed.

Construction of Test Procedures

ETS personnel will construct the specific procedures to be used. ETS has developed a written examination for Chicago School District which meets the requirement of being non-discriminatory. A copy of a report on this examination is appended to this proposal (see Appendix B). Materials similar to this examination will be developed. It is understood that ETS will not use tests developed for other clients without revising them to make them relevant to positions in New York City.

ETS has also developed many different forms of a performance measure called an "in-basket" test, from the tray on the desk of an administrator

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in which the candidate assumes the role of an administrator in a prescribed setting and the candidate reacts to "real" problems. His decisions and the way he carries them out, as if he is actually on the job, provide a sample of his administrative behavior. This technique has been used widely in business and government and performance has been shown to be related to administrative effectiveness.

The Teacher Behavior Research Group of ETS has developed simulation tests of supervisory skills. In these tests supervisory personnel watch videotapes of classroom teaching on which they comment. They are scored on what they perceive as deficient or commendatory, and on the recommendations they would make.

These are some of the kinds of procedures likely to appear in the prototype of the assessment system to be developed. Technical analysis will determine what will be included in the prototype to be proposed.

Alternative Systems and Their Costs

It is likely that more than one system can be developed. These alternatives will differ in the components included, their relative weights, their predicative validity, their relative utility for different purposes, the order in which the components are organized and their comparative costs. We will propose several such alternatives, relevant cost information, and their comparative utilities.

We regard the choice of a prototype for use as an optimizing decision, that is, one in which the benefits to be achieved are balanced against a variety of costs. We will provide the information necessary to make this kind of a decision.

Importance of the Empirical Approach to the Development of the Prototypes

system should have. We are committing ourselves to producing an assessment

system which has two characteristics: it will be non-discriminatory and job-relevant. Any other characteristics that it may have will be determined by

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We are not committing ourselves in advance to any form of testing, though we suspect that a system to have validity will probably have a major component of performance testing. We will provide exemplors of systems likely to have high validity for selecting the most competent individuals whatever form that system may take.

Work Schedule

A nine month time line is projected for this project. Work on the project will begin when the contract is signed and registered. Since this date is presently indeterminate, the schedule below describes the work plan in monthly modules.

1st Month:

1. Selection of the districts and schools in which the job analyses will be conducted and whose Boards and Superintendents will be interviewed.
2. Organization of the job analysis plan
3. Organization of the interview schedule to be used with Community Boards and Superintendents.
4. Organisation of job analysis and interviewing teams.
5. Selection of Advisory Board.
6. First meeting of the Advisory Board.
7. Development of criteria for evaluating incumbents in the position.

2nd - 3rd Months:

1. Conduct of job analyses.
2. Conduct of interviews with Community Boards and Superintendents.
3. Preparation of job descriptions.
4. Preparation of specifications for testing procedures.
5. Rating of incumbents in the position.

1. [illegible] job descriptions by Community Boards and Superintendents.

2. Review of job descriptions and test specifications by Advisory Board.

3. Development of testing procedures.

5th - 6th Months:

1. Development of testing procedures.

2. Review of testing procedures by Community Boards and Superintendents.

3. Review of testing procedures by Advisory Boards.

4. Pilot testing of instruments.

7th - 8th Month:

1. Analysis by Community Boards and Superintendents of their information needs in selecting potential candidates.

2. Development of information system to be used in conjunction with the assessment system.

3. Data-gathering for validity studies.

4. Analysis of data for validity studies.

9th Month:

1. Draft of final report.

2. Review of draft of final report by Advisory Board.

3. Preparation of final report.

The final report of this project will be presented within two weeks after the end of the ninth month.

Personnel

Vitae of project personnel who are currently on ETS's staff and who will be working on this project are in Appendix C. The amount of time allocated to this project by these staff members is specified in the Budget [illegible] from the ETS staff.

Transcript of Hearing before Judge Mansfield
dated June 27, 1972

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE and LOUIS C. MERCADO, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

BOARD OF EXAMINERS, et al.,

Defendants.

E.70 Civ 4141

Before: HON. WALTER R. MANSFIELD, D.J.

New York, June 27, 1972;
2.30 P.M.

APPEARANCES:

ELIZABETH DuBOIS, ESQ., and
JEFFRLY MINTZ, ESQ.,
Attorneys for Plaintiffs.

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER, ESQS.,
Attorneys for Defendant Board of Examiners;
Saul Z. Cohen, Esq., and
Howard A. Jacobson, Esq., of Counsel.

EDWARD FARMAN, ESQ.,
Attorney for a Class of Potential Defendant-Intervenors.

J. LEE RANKIN, ESQ.,
Corporation Counsel of the City of New York, For the Defendant Board of Education;
By. Frances Milberg, Esq., Assistant Corporation Counsel, of Counsel.

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MR. COHEN: Frankly, your Honor, I am a bit surprised with the formality on this proceeding. I was under the impression that you were calling for a conference.

THE COURT: It was going to be informal until I found out that there were these probable intervenors and I was told by somebody that it was expected that there would be a group of individuals arriving here, and as soon as I found that out I said, well, with the limited chamber space that I have, which is quite limited, I do not see how I could accommodate all of you.

I do not have any desire to have a formal presentation here. What I would like is to get down to the real issues, and preferably as soon as possible.

MR. COHEN: Then let me make some observation about what has been submitted to the Court.

Unfortunately, I have to start out by characterizing the plaintiffs' response to our motion as really, I think, quite a blatant misrepresentation. I think that is a generous characterization. They say they did not receive -- that there was no consultation, and they are talking about the fact that the particular document that was submitted was never submitted, but they are quite well aware of the procedures that we are suggesting for giving exams, and in point of fact we have had meetings, we have had discussions, we have had consultations, and it is quite clear that we are not going to be able to reach agreement among ourselves on a procedure.

Secondly, I would like to deal with some other comments about the nature of the order under which we are operating and the basis on which we would have to proceed to try to develop an examination program.

The contention is made by the plaintiffs that there is nothing to prevent us from going ahead and developing procedures and implementing it -- developing examinations, and presumably bringing them to the point where we would be ready to give an examination.

That is not the way we read the order. The order talks about not only giving examinations but in any way continuing to administer any part of supervisory examination procedure.

So we first have a question about the legal order, that it is so broad that it does prevent us from doing what we are trying, to develop an examination procedure; but more importantly we really cannot embark on the kind of a program in order to develop the kind of examination procedure that I think your Honor is urging us to do, without some indication that what we are doing is going to meet the constitutional standards that were laid down in your opinion, because it is a mammoth undertaking. It would be an effort. We are talking about many exams. We have to develop these procedures. We have to recruit people. We have to go through all the steps outlined in our proposal, and to do that maybe in that effort we are headed down on the right road, and maybe not -- it would be really an impossible undertaking.

Finally, I think the Court is practical enough to understand this situation. We have budgetary problems. The Board of Examiners is an arm of the Board of Education and gets its funds from the Board of Education, and without some indication that the program it is about to undertake

is one that is consistent with the statute and one that we can pursue, with the likelihood that it will result in proper examinations, we cannot get the budget which would permit us to undertake this project.

So for these reasons to suggest that we can sit in an ivory tower and research this procedure and develop these examinations without any indication that this is a proper road for us to travel down, is really totally unrealistic.

The plaintiffs argue that we did not fulfill the suggestions of the Court regarding giving them all the essential -- relevant data, is the phrase. We gave them our proposal.

We are creating a proposal for the development of a exams. The things they are talking about that we did not give them, it is not possible to give them in the form they are seeking until we develop an examination procedure -- for example, talking about giving them a job analysis. We set up a procedure for developing a job analysis. We cannot give it to them until we have implemented the procedure.

Secondly, they want the method for creating test items. We have told them how we are going to go about creating these test items.

They talk about validating studies. We have told them how we intend to validate the examinations, that we intend to create that procedure, and to ask us for the studies, obviously we do not have them when we have not developed the examination procedure.

Then finally they talk about evidence of ethnic or racial impact. It is not our understanding that the function of the Board of Examiners is to create an examination which will develop a quota, which is precisely what the technique suggested by ETS, and which is endorsed by the plaintiffs, would do.

We do not adopt that standard now. We did not adopt it in our discussion with them, and we will respectfully decline to adopt that standard.

What we want to do here is get on with the business of developing exams. We think we have consulted with a lot of people. We did it promptly after the order. We arrived at an impasse, and I must also allude, your Honor, to the fact that we felt there was a breach of faith in the conversations that were held when in our view the conversations were to be confidential, and the papers that were involved in those discussions were submitted to the Court of Appeals, which subsequently struck that portion from the brief.

It seems to me we are the juncture where we have done precisely what the Court urged us to do. We have taken a hard look at our examination procedures. We have attempted in every way to meet those constitutional objections which the Court outlined in its opinion, and we have come up with a proposal which has been digested and considered and reviewed by many prominent people in this field, and by our own professional staff, and we think we should be permitted to go forward with this program.

I want to make one final observation with respect to the nature of the changes in our procedure. Your Honor laid great emphasis in his opinion on the contention that our examinations were not properly job-related. As I believe it is clear from our proposal, we have tried to develop an approach which we believe will insure that these exams are job-related in the best manner that we think can be done, and it is consistent with suggestions both from ETS, which was the consultant suggested by the plaintiffs, and which is the method suggested as a matter of fact, by Dr. Barrett, the plaintiffs' expert.

We think in the score of job-relatedness we certainly have done what can be done to meet the Court's demands.

In the area of validation, as the Court knows,

there is a dispute between the parties as to what is appropriate validation, but even there we have made an effort to try to improve the evaluation procedure that has been used, in order to make it as good a procedure as possible. Frankly, the proposals included in the ETS approach was the use -- what I call the current validation, meaning you try out the test on a group of incumbents --we think that is not as good as the approach we have suggested. We do not think you get the degree of motivation on the part of incumbents in taking what amounts to an exercise that you can get from somebody without really taking this exam, in a real sort of meaningful context.

So just to sum it up in two sentences, the plaintiffs have had this material. They have had an opportunity to review it, to discuss it with us and to discuss it with anybody else they want to discuss it with. We have done all that I think we can be asked to do to develop a meaningful new approach to developing examinations, and what we are asking the Court is to give us an opportunity to go forward and develop examinations in accordance with this proposal.

Thank you.

THE COURT: Mr. Mintz.

MR. MINTZ: Well, of course our first problem is what the defendants are allowed to do under this order. We stated our position in our response, which is that as far as we read the order they are permitted to develop an examination system. Of course the only one who can authoritatively answer that is your Honor, but we feel that there is nothing to prevent them from doing that. So we cannot find ourselves in the position of being asked at this point to give a stamp of approval to a system not yet in existence, on the basis of a five-page proposal.

THE COURT: Well, my understanding is from what Mr. Cohen has just said that you have been kept advised as this thing has been going along. You disagree with

that?

MR. MINTZ: Yes, we do. That is spelled out in Miss DuBois's affidavit which is attached to our response.

THE COURT: Yes, I saw it.

MR. MINTZ: We did have consultations -- I was not personally involved in them, but I have been fairly and fully briefed on what occurred in the Fall, while the appeal was pending in the Court of Appeals with regard to the development of a new system.

There was an original proposal from the Board. The Educational Testing Service was brought in. They submitted a proposal which is also attached to our response, and I think the differences between that and the one submitted here are quite manifest. At some point, for reasons apparently having to do with one side or the other feeling that there was bad faith or bad action on the part of the other, those discussions broke off, and since approximately early January there has been no consultation whatsoever.

The next thing we knew was on June 1 when we were served with this proposal attached to their motion.

We have not had any consultations in the interim. We do not feel this proposal represents any sort of agreement between us, and we do not feel it represents any substantial, real measure of being consulted on. When I read the Court's

opinion, particularly the final paragraph of the preliminary injunction and the accompanying memorandum, which suggests to me that the parties get together and engage in some hard bargaining and trying to come up, if at all possible -- and I suggest it is by no means impossible -- with something which is agreeable to all, and to the extent that they cannot that we bring it to the Court's attention. But to have them go about it in this way is not proper.

Moreover, only two of the three parties have any role in this, and that we think is not proper at all. The Educational System in the City of New York involves clearly the Board of Education who are defendants in this case. They have not had any role in the discussions which took place in the Fall, and to the best of my knowledge and information have not had any role in the proposal which is now before the Court. We think it imperative that they have such a role.

Additionally, the Board of Examiners --

THE COURT: What role would you say the Board ought to play? I am talking about the Board of Education. I am not quite clear on that.

MR. MINTZ: We feel that they or a representative of the Board of Education should be able to get together with members or representatives of the Board of

Examiners, with representatives of the plaintiffs, with various counsel, and they should engage in some discussion as to what sort of system we are looking for to satisfy the mandates of this Court and the Court of Appeals, and what sort of system within those mandates will work best for the City of New York.

I do not think this is something which should be arrived at without their participation. Moreover, as Mr. Cohen points out, the Board of Education is one who provides the money for this.

THE COURT: I understand that, but I had never thought that the Board of Education was taking the position that they were going to participate in the formulation of examination procedures for supervisory positions.

I thought they felt that was the problem of the Board of Examiners, and that they would take a sort of neutral attitude. They certainly did that during the hearings, and indeed they were simply saying this would have to be resolved, and I had always visualized that the party who was saddled with the job was the Board of Examiners.

MR. HINTZ: Well, both statutorily and as a practical matter they have the principal role in developing examinations -- no question about that. But we think

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the Board of Education and the Chancellor do have an interest.

Counsel for the Board of Education and the Chancellor is here. Perhaps she would like to speak on that question.

MISS MILBERG: Your Honor, I have been instructed that we are going to take a neutral position on the development of these examinations.

THE COURT: All right.

Well, Mr. Cohen, what I have difficulty with is this: there seem to be two differences between you, or really only one difference that I can see, and that is that you do not think that there has been a good faith, mutual consultation with respect to these procedures that are to be presented.

Mr. Cohen thinks there has been and that there has been a sufficient disclosure in advance to permit you to tell what you do not like or to make a counter-proposal.

It seems to me that I can proceed here in one of two fashions:

One is to take your papers and either grant or deny the motion, which is the simple way, or maybe it isn't but at least it is definitive.

The other is to find out just what it is that you feel on the basis of what has been disclosed to you so far is objectionable.

What I hoped -- and I think if I said it once I must have said it three or four times in anything that I wrote -- was that once having satisfied myself that the existing procedures were constitutionally defective, the parties would get together since they would know much more about these matters than I could hope to know, and would hopefully have more time and incentive to resolve these differences. That was stated not only by a decision but in the order.

Now if there are issues here about this proposal that you feel have been discussed and cannot be resolved, then I guess I will have to take course No. 1. I would much rather take course No. 2, and that is, to feel that you had reviewed this together, exchanged thoughts with respect to any matters where you had differences and were coming in on only the last, unresolved issues for decision. But what I do not understand is, first of all, why there is such a wide difference between you as to mutual exchange of information. It seems to me that ought to be answered easily -- either you have or you haven't had a sufficient disclosure to make.

MR. COHEN: If the Court please, the proposal that was submitted on November the 9th, which was discussed

in meetings on the 23rd of November -- let me see; I wrote these dates down --

(After examining) The 23rd of November, the 8th of December and the 27th of December meetings -- that proposal inall essential steps is the same as the proposal that has been submitted with our motion papers.

The changes that are included in that proposal are the results of those discussions, were primarily to meet the plaintiffs' charge that our earlier proposal was not specific enough in certain respects, and the subsequent proposal was an effort to try to make it more specific in certain respects.

There were disagreements in those meetings regarding certain fundamental questions, and there was an effort to try to resolve them, and it became clear to us that we were not going to resolve them on the basis of the material that was emanating from the plaintiffs.

Also it became clear to us that we couldn't hold the kind of frank discussions that are required for this kind of thing when anything we said or did was going to be used to our disadvantage in forthcoming litigation on this subject.

I do not think, having had what are really the documents that we are talking about now -- I cannot say

they were exactly that because there were changes, but they are essentially the essence of our proposal, or the substance of it, since November, 1971 -- I do not think that the plaintiffs can be heard at this point to say that they need time to evaluate it.

I might also point out that we are in the position where, from the plaintiffs' standpoint, they have complete and total relief. The dilatory incentive here I need not point out is substantial, because as far as they are concerned they won this case, and the longer it takes to get to the point where we can do anything the better it serves their purpose.

We want to get back in business. We want to perform our statutory function, and we think we have a proper basis for doing it, and we would like the Court to say so.

MISS BuBOIS: Your Honor, if I may say one thing, in discussing whether information has been exchanged about this proposal, it is really a false issue because it is true that proposals somewhat similar to this were submitted to us and we made it clear, after talking to our expert and talking with them with our expert, that that proposal, as well as their present proposal, is so vague and so preliminary that we would have no way of

telling what system they ended up with.

It would be very easy for them to modify in the most minimal way their present system and have it fit within the kind of scope of this very broad, nice-sounding proposal. What we came up with as a possible way out of this dilemma was if they really felt they had to go ahead at this point with some kind of order, we came up with the notion that "Let's give it to somebody that we can trust, possibly some third impartial, hopefully, expert party and let them do something," but this would turn over to these people with complete freedom, and to get the Court to approve it, it seems to us is totally inconsistent with what your Honor indicated in the first order.

This is a proposal that they will develop in the future. There is no way of even discussing whether they have exchanged information about the examination system, because this is not the way. An examination system, you know, is something that could exist six months from now possibly, and our own expert, Dr. Barrett or ETS, or anyone we may bring in, would not consider this examination procedure a system; it is a proposal. There is no protection for us in that form, and it would put us in the position of bringing some lawsuit two months from now, or whenever they do institute the system.

Also I would like to point out that the Chancellor and the Board of Education do have really a role here. But the Chancellor has always been responsible by law for administering the jobs -- he is responsible for job analysis, and the Board of Examiners has even said in this lawsuit that they do not develop job analysis -- that it is the Chancellor. Clearly he has to be part of the discussion.

Also the Board of Examiners is no longer the Board of Examiners which has been defending this lawsuit. Indeed it was more or less in existence at the time these papers were filed. There are now three members of the five members of the Board of Examiners who have been designated by the Chancellor, which seems to us grossly unfair to proceed on the basis of this document without giving us a chance to sit down with the new Board of Examiners. The Board of Examiners we spoke to, or the two people we spoke to cannot possibly represent the Board that is now in existence.

I also do not think -- it is true that we arrived at an impass -- it seems now to be an impasse but it is my opinion that we are in the course of very productive discussions which could possibly produce a new examination system, and we were never told why those were

broken off. I do not think they have to necessarily be broken off. If there is any reason that ETS or any other impartial body that your Honor would consider impartial and a third party could not help participate in this discussion and help in the development of a new system in connection with this.

THE COURT: Well, I have not gone over these papers in as much detail probably as I should, but my initial impression is this, that there should be a more flexible attitude by both here. I do not think that I am in a position now to approve any system, particularly one if it is in vague terms, that would be considered final for permanent appointments and the like, in the future.

I think the way to go about this would be to start working out a system whereby you can make appointments upon the basis of some system -- perhaps appointments that would not be permanent but would be temporary, and then evolve this in stages so that as you develop an examination system it will then reach a point where the bugs in it will begin to come out.

All examination systems are processes of evaluation. They are not going to stand still, and we cannot just say, "This examination system is the final one and

now you may begin making all permanent appointments to supervisary positions on the basis of it."

MR. COHEN: Your Honor, I wish we could have persuaded you that the examination system is not static when we argued the last time around, and it certainly is not static. But we have to have a starting point. We have to have a base on which to start.

THE COURT: I agree.

MR. COHEN: And we have to have an expression that seems to us that this appears to be a reasonable position. We are not asking carte blanche that if the Court says this appears to be a reasonable approach, that any examination that we claim follows the approach is, ipso facto, perfect. We recognize that, if the plaintiffs were to contend that we did not follow the procedure, that we did not do what we said we would do.

I want to digress for a moment or interject at this time because of something Miss DuBois said. Really I think it is at the heart of this whole matter, and that is the colossal suspicion that we are some machiavellian, disbollical group that has been organized in order to frustrate the civil rights and the civil liberties of exam-takers. She introduced in every step of the proceeding, when we were gathering statistics, when we were

developing a proposal, she wants to bring in some third party, some so-called "impartial third party," because based on what we have seen in connection with the ETS performances, we were very unimpressed with their "impartiality."

There is an atmosphere here expressed by the plaintiffs that somehow we cannot be trusted to do our statutory job.

Well, the State has imposed this job on us. We want to do the job and we want to do it in a way which is constitutional, and we say we are impeded from doing this job by your order. We want to get back in business. Now if they do not like what we have said, they have ample opportunity to tell us what they do not like. They have not asked us for a particular item. They have not said to us, "You have not given us A, B, C, D or E, which we need in order to assess your proposals."

They have said, "Your proposals are vague," so we have gone back and made them less vague. What they want to do is to delay this proceeding in order to avoid giving examinations.

THE COURT: Suppose you were permitted to go ahead and give examinations, what kind of appointments do you propose to make for those who have passed the exams?

MR. COHEN: Your Honor, let me make one thing clear, we do not make appointments.

THE COURT: No, but I mean you declare them eligible?

MR. COHEN: That is why when you talk about a piecemeal step-by-step proceeding, it could not work that way. We have to be in a position to utilize a procedure, to utilize an examination. There are currently 33 positions at this instance which require the giving of examinations. That excludes all those examinations that were enjoined which were either in a completed state or partially completed state. I am not talking about those. I am talking only about jobs which require the giving of examinations under State law. We would have to go about taking the procedures that we are talking about, and creating an examination.

I would assume that if we do what we say we are going to do, if we develop a job analysis, and the way we say we are going to do it, and we insure the validity of it, if we do all the things we say we are going to do, we will come out with an examination that meets the constitutional standards of the Court. If at that point -- it takes us a long time to come up with an examination. And if the plaintiffs say, "You did not do what you said you were going to do; you were supposed to do X and you did not do

it," or "We want to see how you did Y," certainly that is their privilege and their right, but to say to us, "Don't do anything until you develop examinations which we then can approve" -- incidentally, your Honor, we are not talking, as everybody knows, about a standardized examination which is given over and over again -- like police examinations or firemen's examinations where if you develop a prototype, that is the examination that is given.

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We are developing a continuing series of examinations, and they change. We need to have a procedure that the court at least can tell us: "This looks like you are heading down the right road, and if you do what you say you are going to do I am satisfied that that would meet constitutional standards."

That does not bind anybody that what we will come up with actually meets it. We cannot tell you until we do it. We certainly are operating in good faith, and I am really discouraged to hear from the plaintiff the suggestion that somehow or other we are going to do something very devious here that is going to deprive people of their rights.

MISS DuBOIS: Your Honor, I would like to point out that it is very specific in their papers that they are asking for permission to develop a system, to give examinations, to promulgate lists and to issue licenses. We feel that no order should issue now, but if any order should issue it seems to me at most they should be allowed to go ahead and develop something. But before they give examinations, at the very least, that we have a right to look at that examination system. Otherwise there is no point in our bringing this suit. We are back in the position where we were when we brought it.

THE COURT: How do you get around this problem? As I understand Mr. Cohen, he stated, well, that assumes that

you can build the examination structure for these different supervisory positions all in one fell swoop, and to do that it is impossible, and what you do is you go step-by-step and you get the money in order to develop the examination.

Am I right?

MISS DuBOIS: Their problem with the budget is with the Board of Education, and I think that is a problem that will exist whether or not an order comes down. That problem I will find out, if we do sit down with the Board of Education. They fear that the Board of Education does not want to fund a lousy examination system. I do not think an order of this court can force the Board of Education to fund such a system. That is one of the things, when you are talking in a vacuum-- we cannot even talk to this Board and find out what they are willing to do and under what circumstances.

THE COURT: As I understand it, the problem they face is this -- and, Mr. Cohen can correct me if I am wrong -- if they go forward, if they get this order, then they go forward and get the money and they can prepare the examinations which, as I gather, is a fairly expensive procedure.

Then they can try to comply with the standards that have already been established as a result of this litigation.

If in the interim, however, the examinations that

are prepared turn out not to comply, I suppose that the answer is you would be back in court seeking to enjoin the administering of them on the ground that they are not examinations that comply.

MISS DuBOIS: We do not have a chance to do that second thing under their language, because we would not even have a chance to see the examinations until they were already out. We would have to start with people having filed them three years from now coming to us. They do not even want to show us the examination system before they institute it. I mean, that is the clearest problem, it seems to me, what they want to do. There is no reason, even assuming what I think is grossly untrue, that they need an order in order to get the money, they certainly do not need an order to actually administer examinations, license people and have them appointed. All they need in order even under their own theory is to spend money to develop an examination system. So at the least, that is all the order could allow them to do.

The second thing is they do not need an order to get money. The only reason is if the Board of Education had this kind of lack of faith that has been attributed to me and does not trust them to develop a system, why don't we sit down with the Board of Education and find out if that is true. If the Board is not willing to come to them, and if

not, why not?

I would also like to stress the point that I do not think it is fair to be proceeding on the basis of Dr. Rockowitz -- so far as I can see no one else in the Board of Examiners said so. I think someone ought to be allowed to get together with the new Board of Examiners.

MISS MILBERG: I know that the Board of Education and the Chancellor are willing to meet with the other parties to this lawsuit to discuss examinations and examination proposals. At this point I am not aware of budgeting problems involved here because I am not familiar with the lawsuit and these particular problems, but I would like to inform the Court at this time that we are making acting appointments to fill the supervisory positions which are now open, which would not in any way impede the development of tests.

THE COURT: I am aware of that. That situation existed back at the time when the preliminary injunction was issued. I think I mentioned at that time that supervisory positions could be filled by acting supervisory personnel appointed under the system that the Board of Education has established, and, as I understood it, they do not gain tenure.

MISS MILBERG: No, they do not gain any tenure.

THE COURT: Well, what is your answer to the suggestion that really it amounts to whether -- a question of

whether the Board of Education is not willing to finance your going forward and taking a chance that the examination system which you develop will pass muster.

MR. COHEN: Your Honor, the Board of Education finances the examination system that is developed by the Board of Examiners. But the problem here is if the Court gives its imprimatur that the proposed procedure for developing examinations is an appropriate one, we do not anticipate a problem. On the other hand, if we have to, in effect, negotiate an examination procedure with the Board of Education, based on speculation whether it is or is not constitutional, then we can anticipate this significant problem.

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THE COURT: I do not follow that. It seems to me all you have to do is prepare a proposed examination for elementary school principal or whatever it is, or assistant principal; go over it with the plaintiffs in the case, plaintiffs' counsel or their representatives, and point out the method by which it was developed and determine, if you can, that it does seem to comply with the standards, that vague as they are, are in the opinion, and then if you cannot do so we will listen to any objections.

I do not see that that necessarily adds a tremendous burden budgetwise.

MR. COHEN: This procedure involves a significantly

different kind of expenditure from the procedure that was heretofore used.

We are talking about a lot more interview examinations. We are talking about a lot more simulation type of examination. We are talking about a program of examinations which is going to be substantially more expensive. We think it is important in order to meet our statutory obligation and to meet the standards laid down by the Court, and we have to be in a position to get the kind of funds necessary to develop this program, so that we need the assurance that the direction we are going in is the proper direction.

I want to deal with this red herring about the Board of Examiners. The acting Board of Examiners throughout this procedure are the Board of Examiners. It is true that there have been two nominations made by the Board of Education who will presumably get assigned at some point. They are not yet assigned.

We have a function, and we are functioning. When they are assigned, they are only assigned as provisional examiners, which means their appointments can only be for nine months -- that is because the Civil Service procedure requires the giving of an examination.

So talking about dealing with some different board, we are dealing with a board that is statutorily established

in order to deal with this problem.

I think, your Honor, that the question of our going forward with this undertaking, which is a substantial undertaking, in the absence of any instructions from this court, that approach we are taking under one theory will lead us to a conclusion, if it is followed -- is taking us really to a fly-blind. I think we are entitled, in view of the breadth of the order which is issued here, to get some instructions from the court I think it would be unfair to leave the defendants in the posture where they are going to say "Let them go ahead and do their damnedest, and then in the end if we like it we will yell 'bingo' and get the prize."

Why should this plaintiff be treated differently from any other injunctive action. When an injunction is granted the court says "Don't do X" or "Do X, whatever they wish to do." But the plaintiff here goes ahead and says if we go ahead and they do not like it, why he has to go back to court to complain about it.

THE COURT: There is one difference. You are dealing, so far as the Court is concerned, with a relatively complicated, esoteric subject matter, the formulation of examinations, on the basis of which permanent appointments are made or appointments that will be permanent and entitle the appointees

to tenure is founded. 114a

Now if I am forced to, I will have to cut the Gordian knot by applying, perhaps slightly blind view -- saying "This looks all right, but this looks as though it needs modification here and there", and I go forward and finally sign an order modifying the injunction, to whatever the extent of the modification is. But I would much prefer to see you both sit down, and to the extent that the Board of Education wishes to participate, because it holds the purse strings, and as Miss DuBois points out, it does provide originally by statute, at least, the job analysis which I suppose is integrally tied up with the problem -- it can participate.

I would much prefer that you sit down and try to work it out. Then I have much more confidence than I would in what I would do. But if you are going to force me to do it, then I will do it, but I just cannot believe -- and I am being very frank now -- that you people, if you will stop being such bitter adversaries and become a little more flexible, why you cannot sit down and work this out. And I think on the side of the plaintiffs, who obviously are not going to be able in advance to formulate an examination that is designed to assure a racial or minority group passage, because that is not the test.

On the other hand, you were the ones that brought this suit. You attacked the job-relatedness of the examinations, and contended that the examinations had the effect of denying people constitutional rights and equal protection.

Now you just cannot obviously, at this stage, I suppose, from a practical standpoint let things stand absolutely still. I do not believe that you would want to do that, because I do not think it would be a fair and reasonable way as officers of the court to proceed now and get the idea that the Board, on the one hand, has been wedded in the past to pretty definite procedures. It has been the boss in the field and has been able to call the shots and has not felt the necessity for sharing confidences with others -- much less plaintiffs. I can understand a certain amount of resentment in how they arrived at procedures, but the litigation has reached the stage where I think the Board has to do that, because I see no other or reasonable alternative other than to have some judge who is not as well equipped as the plaintiff own representatives are, either deny your motion, refuse modification or grant them on some conditions that will turn out to be harmful to all parties involved.

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My request would be that if you need help by burying some of the hatchets that you have been bearing in each other for the last year and a half, and start looking upon yourself

from a third-party standpoint -- and I say to the plaintiffs "Don't stall."

I say to the Board "Please give a little more by way of information. See if you cannot iron out some of these things in an atmosphere that will be more conciliatory."

I can tell you that I will not be able to, unless I act within the next few days, to rule on this motion, other than either grant it or deny it, and I don't propose to do that. I would wait because I am going to be away during the following three weeks, then I will return.

What I would hope is that you can all get together and have one last crack at it and report to me whether you have made progress, and perhaps we can then have a conference next time in my chambers rather than here.

I was told that there was going to be a group of people --

MR. FIERMAN: I am sorry, your Honor, if I contributed to that.

THE COURT: I happen to be one of the late-comers in this building whose chambers are rather restricted in square footage, and the result is I can only accommodate about seven or eight people at a table. But if that is what you want to do -- I mean, that is what I would like to do, would be to have you sit down and see if you cannot take one more whack

MR. COHEN: Your Honor, may I make one additional comment?

THE COURT: Yes.

MR. COHEN: I do not think that this case can be separated from some of the political implications that surround it, and I would not want us to be pursuing an ideal which some of the realities of this situation make clear are unattainable.

I think we ought to be dealing with reality here.

The Chancellor's public statement has repeatedly made very clear that his objective is to eliminate the Board of Examiners.

He does not want an examination system. He does not want anything to do with an examination system. He has a representative on the Board of Examiners who does not participate in the development of this, because they do not want to develop a system.

We have a Board of Education which is torn by certain factionalism which is barely -- I appeared at one session before the Board of Education to urge them to delay the promulgation of certain acting guidelines, and when I announced that I represent the Board of Examiners I was roundly booed, and when I stated that the Board of Education

had appeared in this action, there were denials by members of the Board, and there was a tumult by the crowd.

This is a charged and loaded situation, and I think the expectation that we are going to be met with sweet reasonableness in our efforts to try to develop an examination procedure may be an expectation that is unwarranted.

I also would like to point out again that when you keep referring to giving information or giving somethinh that we have not given --

THE COURT: I mean imparting. I don't mean giving away.

MR. COHEN: We have sought to be as open and as direct as we could, and I think we can be in a position of actually moving forward and developing these examinations. There is nothing to give.

One observation which was made, which I think is a fair limitation on our activities would be that if they are fearful -- they appear to be fearful that a permanent list should be granted on our part prior to any opportunity for review. Well, certainly that is a condition which could be protected against by appropriate language in an order. There was nothing to say that if we go forward and give examinations and give licenses that that could not be given, but I must say I am normally an optimist in adversary

situations, and I, too, share your view that the parties ought to work things out, but I think we are in a context here that is highly unlikely.

MISS DuBOIS: Your Honor, there is one thing I would like to point out, and that is the Chancellor appointed two new members of the board. It is only by virtue of those provisional appointments that this board has a legal quorum to take any action whatsoever, and if they did not have those appointments they could not conduct business. Again, I do not see that to deny us a chance to meet with this new board--I thought we were close to working out something before, and I think we might work something out with this new board. Also, as far as the Board of Education is concerned, they were never given a chance to see whether they would fund or not fund. They have never been shown, except in the context of this paper filed in court -- they were never shown the earlier proposal.

THE COURT: Miss DuBois, let me ask you this, in response to what Mr. Cohen just said, what is to prevent me--this is just arguendo -- from issuing an order which would in effect permit an examination system to go forward but provide that it could not be used for permanent appointments until further order of the court.

In other words, you said earlier, if I remember

rightly -- or maybe Mr. Cohen did -- that the Board of Examiners, of course, can only appoint and determine who is eligible and certify them, and they are then eligible for permanent appointments, isn't that right? -- as I recall it, under the statute? Well, what is to prevent the court from saying "We permitted on condition that that is restricted by court order to appointments only on a temporary basis"?

MISS DuBOIS: As a practical matter, your Honor, I think that any system which is developed and that goes into operation in two months or six months from now, whenever it is, will have enormous impetus. If this litigation has meant anything, it has meant some hope for developing some truly new and informed system, and I think to go forward with a stamp of approval on whatever they develop at this point, without trying to have some further fruitful discussion would be to really eliminate hope for a change.

THE COURT: Well, I have just finished urging that, Miss DuBois. But what I am saying is that, assuming the worst, as was just pointed out by Mr. Cohen, that you are not going to be able to get together because of certain practical, or I think it was labeled "political" reasons-- assuming that, what is to prevent at least the ball being pushed forward to some extent by saying "Let us try this system out and only put one hooker on it, or one string on it, and

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that is until we begin to see how it works, and what your objections, if any, are to it. Appointments may not be made on a permanent basis. In other words, instead of appointing acting supervisory personnel under -- what is it, Section 1102 of the New York Law? -- I can't remember -- the one that is used for acting appointments -- we will appoint them from this list, and the difference will be that they won't be permanent until some further modification of the injunction.

MISS DuBOIS: Because I think the impetus to the Board of Examiners is going to end up, if we cannot work out some joint thing -- they will end up doing this completely on their own, without the impetus to develop a really reformed system -- it is going to exist only if they are forced before they put that into operation, to submit it to the court for some final go-ahead. If politically from their point of view -- even under the operating system, even though these people are not called permanent appointments, there is very little threat --

THE COURT: Very little what?

MISS DuBOIS: Threat-- I do not think there is that much difference to the Board of Examiners as long as they have an operating system.

THE COURT: The difference is that the appointees do not get tenure.

MISS DuBOIS: But from the point of view of the Board of Examiners, which is somewhat concerned with its own tenure and political continued existence, they are functioning. They have been making appointments, and New York is operating under it. I think that is very important.

I also think that obviously they are worried about what is happening in the schools in the meantime. That is one reason for what your Honor suggested, but I think there is no need for that because we have an interim operating system. The Chancellor is in the process of working out and continuing to work out procedures for improving the system.

THE COURT: But you are now saying that through this lawsuit you could remake the system in a way that might be completely different from the attack on it. In other words, in a way that is not necessary to satisfy the weaknesses that you say are inherent in the existing system.

MISS DuBOIS: No.

THE COURT: The attack was on the examination.

MISS DuBOIS: That is all I am saying. I was suggesting that you come up with a really job-related system, with something that is really different from the present system and which is designed by professionals and is given by professionals rather than part-time teachers in the school system -- to really turn around what I think is a completely

unrelated job procedure -- I am not talking about legislative change; I am talking about the Board of Examiners taking a look at the system and doing something new rather than making a few trifling changes which would make no real difference.

THE COURT: I don't follow that. I would think that if the Board of Examiners comes up with an examination system that shows a good-faith effort to satisfy the objections that were the basis of the injunction, but it is not proven because this is not one of these things that can be done or hatched full-grown. We could take in steps, such as I have suggested. Then if it begins to prove itself you are in a position where at least a system has been evolved with the court's permission. That will then become the basis, probably with some modification, for satisfaction in toto of the injunction.

MISS DuBOIS: Your Honor, I think if we got to that point we would want to call experts like the people at ETS, to show your Honor that the testing experts believe it is possible to prove out at least a system, for proving it. They were the people listed originally that the board had consulted. We did not go to them first, but they said they would not institute a new examination system without validating it first. I think we should have some chance to explore that with the experts. But the notion of letting them test it out with an operating system, with people in the field I think

is really inconsistent with that.

THE COURT: But what I am suggesting is, in effect, a method of validation because what you would be doing would be making temporary appointments on the basis of it, and if it then turns out that the system had bugs in it and was not a valid job-related system, it could be modified and there would be no harm done.

MISS DuBOIS: I think any system should have a procedure for continuing validation like that.

THE COURT: Well, I am going to --

MISS DuBOIS: It seems again that nothing would lead to approving in advance a system first which we have not seen, and there should be some validation before it is actually released.

THE COURT: Are you willing to make one more try? I say that to both parties.

MR. COHEN: Absolutely.

MISS DuBOIS: Yes.

* * *

[Transcript ends on page 47]

Stipulation of Settlement dated March 8,1973,
with exhibits

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

BOSTON M. CHANCE, et al., :

Plaintiffs, :

-against- : 70 Civ. 4141

THE BOARD OF EXAMINERS, et al., : STIPULATION OF SETTLEMENT.

Defendants. :

- -X

WHEREAS, on September 24, 1970, plaintiffs commenced the above-entitled action alleging that examination procedures administered by defendants for supervisory positions in the New York City School System unlawfully discriminated against plaintiffs and their class in violation of the United States Constitution and of the Constitution and statutes of the State of New York; and

WHEREAS, plaintiffs' motion for a preliminary injunction was granted by opinion filed July 14, 1971, and a Preliminary Injunction order was entered on September 20, 1971, together with a memorandum opinion of that same date which, inter alia, restrained defendants from conducting or administering examinations for supervisory positions, or promulgating lists or issuing licenses or making, authorizing or allowing appointments based on previous examinations, and which made provision for an interim system of selecting supervisors on an acting basis, and the opinions and order were affirmed by the United States Court of Appeals for the Second Circuit on April 5, 1972; and

WHEREAS, defendants have appeared by their attorneys,

and by their answers and papers submitted in opposition to the Preliminary Injunction, denied the material allegations of the complaint and of each amended complaint; and

WHEREAS, on June 1, 1972, defendant Board of Examiners moved, pursuant to the second ordering paragraph of the Preliminary Injunction order dated September 20, 1971, to modify that Preliminary Injunction in order to permit the development and implementation of further examinations for supervisory positions, and the promulgation of lists, issuance of licenses and making of appointments based thereon; and

WHEREAS, at the hearing on the Board of Examiners' motion on June 27, 1972, the Court invited the parties to attempt to resolve the subject of the motion through discussions amongst themselves and indicated that it would withhold consideration of the motion pending such discussions; and

WHEREAS, on October 25, 1972, defendant, Board of Education, issued "Regulations governing the assignment of acting supervisors" promulgated as Special Circular No. 30, 1972-1973, which established an interim system for the selection of acting school supervisors; and

WHEREAS, plaintiffs and defendant, Board of Examiners, have met on numerous occasions since June 27, 1972, and have established a task force consisting of their representatives to continue discussions aimed at developing and recommending a new comprehensive supervisory selection system for the New York City School System which will provide for the selection of supervisors in the future on the basis of "merit and fitness" and without unlawful

discrimination; and

WHEREAS, pending the development of such a new comprehensive supervisory selection system, all of the parties to this action desire to finally resolve the issues raised in this action with respect to past supervisory examination procedures, defendants, while denying all liability on the charges made herein, in order to avoid further expenses, inconvenience and the distraction of burdensome and protracted litigation, both to themselves and to the entire New York City School System, and plaintiffs, in order that all persons performing the duties of school supervisors for significant periods of time may be treated on an equal basis, in order to remove some of the uncertainty characterizing the present acting assignment system and to enable the schools to operate with licensed personnel, and, finally, in order that available energies and resources may be devoted to the development of a comprehensive new selection system,

NOW, THEREFORE, it is hereby stipulated and agreed by and among the undersigned, subject to the approval of the Court, that the above-entitled action shall be settled and compromised in the manner and upon the terms and conditions hereinafter set forth:

DEFINITIONS: As used herein, the following terms shall have the following meanings:

(a) "Plaintiffs" shall mean the plaintiffs named in the Second Amended Complaint, and "defendants" shall mean the defendants named in such

Second Amended Complaint, and their successors in office, in the above-captioned civil action.

(b) "Court" shall mean the United States District Court for the Southern District of New York.

~~I. This Stipulation of Settlement shall have no effect and shall not be submitted to the Court until and unless joined in by all defendants.~~

II. The parties hereto consent to the making and entry of a Judgment in this action providing, inter alia, the following:

A. Determining this action to be a class action maintainable under F.R. Civ. P. 23(b)(2), as set forth below.

B. Except as provided, permitted and authorized in sub-paragraphs C, D, E, F, H and I hereof, permanently enjoining and restraining defendants, their agents, servants, employees and attorneys, and all persons in active concert and participation with them from (1) conducting further examinations for supervisory positions in the New York City School System, (2) processing or grading or in any other way administering examinations for supervisory positions in the New York City School System which have previously been administered, and (3) promulgating eligible lists or issuing licenses solely on the basis of examinations for supervisory positions in the New York City School System which have previously been administered.

C. Community School Boards within the New York City School System or the central Board of Education (hereinafter referred to as "appointing authorities"), are permitted and authorized to select and appoint supervisory personnel for positions within their respective jurisdictions from among the following persons subject to the provisions of paragraph F, infra:

1. Persons whose names appear on Board of Examiners' lists for the positions set forth on Exhibit A hereof, which lists have either been heretofore (a) promulgated or (b) completed but not promulgated or (c) prepared but not completed solely because the Board of Examiners has not completed the required check on eligibility requirements established by the Board of Education* provided, however, that persons on such lists are determined by the Board of Examiners to satisfy said eligibility requirements.

2. Persons who have previously taken and passed a written examination for the supervisory positions under the jurisdiction of the central Board of Education which are set forth in

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*Except in the case of the District Supervising Attendance Officer list where training and experience of candidates must be rated.

Exhibit B hereof and who, subsequent to the entry of the Judgment, perform to the satisfaction of the Board of Examiners, certain additional job-related tasks.

3. Persons (a) who have been or will be appointed to a supervisory position in the New York City School System on an acting basis to fill a vacancy*, either in accordance with Special Circular No. 30 or in accordance with previously applicable procedures, or in accordance with procedures subsequently developed by the Chancellor or the Board of Education, and (b) who have completed or will complete at least 5 months' service in that position on an acting basis, and (c) who satisfy the eligibility requirements set forth in Part III (A)(1) of Special Circular No. 30 and the requirements of Section 236 of the By-laws of the Board of Education, as determined by the Board of Examiners. Such persons shall

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* For purposes of this stipulation the term vacancy shall be defined as it is in Part I of Special Circular No. 30, 1972-1973 dated October 25, 1972, of the Chancellor of the Board of Education of the City of New York (a copy of which, hereinafter referred to as "Special Circular No. 30," is Exhibit C hereof).

be licensed only after their on-the-job performance in that position has been evaluated and examined by the Board of Examiners, in conjunction with the appointing authority and pursuant to criteria developed with the appointing authority, which shall be consistent with the mandate of Part III (B)(3) of Special Circular No. 30, provided, however, that pending implementation of a new selection system pursuant to Paragraph I hereof, the appointing authority is authorized, in its discretion, to continue the employment of any person who is not licensed pursuant to the aforesaid evaluation and examination on an acting basis so long as the appointing authority considers it appropriate, and such person may apply for re-evaluation and re-examination hereunder provided, however, that there shall be at least a five-month interval between such applications. The evaluation and examination required by this Paragraph C shall be completed within 60 days from the date the Board of Examiners receives the candidate's application.

D. In the event a person is eligible for licensing under the terms of more than one sub-paragraph of Paragraph C, such person shall be permitted to apply for

licensing under all such sub-paragraphs and shall be licensed if he qualifies under any one.

E. Applicants who satisfy the requirements of Paragraph C hereof shall be issued licenses for the particular position, if they are not already so licensed, and shall thereafter be entitled to all the rights, privileges and perquisites, and be subject to all the laws and regulations attendant thereto.

F. No appointments shall be made, and no licenses reinstated or issued pursuant to Paragraphs C and hereof until the Board of Examiners shall have:

1. completed its evaluation and examination of the on-the-job performance of all acting supervisors who have submitted applications pursuant to Paragraph C (3) hereof within one month of the date of entry of the judgment in this case.

2. submitted a report to the Court, with copies to plaintiffs' counsel, indicating separately with respect to persons examined pursuant to Paragraph C (2) and (3) supra,

(a) the number of examinations given

(b) the type of examinations given

(c) the number of applicants participating in each type of examination, their race/ethnicity (black, Puerto Rican, white), and pass-fail results of each examination, specifically showing the comparative performance of blacks, Puerto Ricans and whites.

Appointments shall not be made nor licenses reinstated or issued until three weeks after said report has been received by the Court and by plaintiffs' counsel.

Licenses shall then be issued (or reinstated) on a simultaneous basis to persons who have qualified pursuant to the provisions of Paragraph C(1), (2) or (3) supra.

G. Reports containing the information specified in Paragraph F (2) supra shall be submitted by the Board of Examiners to the Court, with copies to plaintiffs' counsel every four months for so long as the interim system for the selection of supervisory personnel provided for herein operates.

H. A Community School Board or the central Board of Education may select and appoint supervisory personnel to positions within their respective jurisdictions, pursuant to Paragraph C hereof, from among any of the groups of persons described in Paragraph C hereof, and nothing contained in this stipulation, or in the judgment entered pursuant thereto, or in any law, regulation, by-law, or contract, shall be deemed to require any such Community Board or the central Board to give priority to any one such group of persons as against another.

Accordingly, pending the implementation of

a new selection system pursuant to Paragraph I hereof, the appointing authority is authorized to fill vacancies either by the assignment of acting personnel, or by the appointment of licensed personnel. Nothing in this stipulation, or in the judgment entered pursuant thereto, or in any law, regulation, by-law, or contract, shall be deemed to require that vacancies be filled by licensed personnel. With respect to the assignment of acting personnel during the aforesaid interim period, the appointing authority shall be permitted and authorized to select persons who satisfy the eligibility requirements established by state law and by the Chancellor and the Board of Education of the City of New York, without regard to whether such persons presently hold regular appointments or assignments, supervisory licenses, or have passed supervisory examinations, or any portion thereof, administered in the past.

I. Any party may, upon at least 3 weeks' written notice to counsel for all other parties, apply for modification of the Judgment to permit the implementation of a new system for the selection of supervisors in the New York City School System, provided that a detailed description of the new selection system, together with all relevant data relating to the new selection system and its development, have first been made available to all other parties and an opportunity afforded to such

other parties to review such data and to confer with the applicant with a view to resolving any differences that may arise and reaching agreement upon new examination procedures that are to be the subject of such application.

III. The parties hereto shall forthwith submit this Stipulation of Settlement to the Court, shall recommend approval of same, and shall petition the Court to enter an order (in the form attached as Exhibit D hereto or in such other form as the Court may direct):

A. Approving the following temporary settlement class, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure:

> The class under Rule 23 (b)(2) of the Federal Rules of Civil Procedure shall consist of all blacks and persons of Puerto Rican or Latin American descent or origin who would have been or may become eligible for regular appointments to supervisory positions in the New York City School System but for their failure to possess the licenses which have in the past been issued on the basis of the supervisory examination procedures hitherto conducted by defendants.

B. Setting this cause for hearing before the Court at such time and date as the Court may direct,

with regard to whether the proposed settlement is fair, adequate, in the best interests of plaintiffs and the members of the temporary settlement class, and should be approved by the Court.

C. Directing that all members of the temporary settlement class be given notice in the manner and in the form provided by Exhibits D and E (or in such other manner and form as the Court may direct) advising them:

1. Of the pendency of the above-captioned civil action and of the proposed settlement thereof; and

2. Of the hearing to be held with regard to whether the settlement is fair, adequate, in the best interests of plaintiffs and the members of the temporary settlement class, and should be approved by the Court, at which hearing any interested member of that class may be heard.

IV. If the settlement is approved by the Court, following notice and hearing at which all members of the temporary settlement class shall have been given an opportunity to be heard, then Judgment shall be entered in this action in due and proper form, which Judgment shall be clothed with finality, pursuant to Rule 54(b) of the Federal

Rules of Civil Procedure, so as to be final and conclusive, and shall:

A. Declare and establish the temporary settlement class described in Paragraph III A hereof as a final and permanent class.

B. Approve this Stipulation of Settlement and adjudge and declare the same to be fair, adequate, and in the best interests of plaintiffs and the class, and direct the consummation of its terms and provisions.

C. Contain, inter alia, the language set forth in Paragraph II A through I hereof.

D. Adjudge that except insofar as plaintiffs' claims are resolved by the terms of this Settlement and the Judgment entered pursuant thereto, this action, and all other claims asserted therein, shall be dismissed with prejudice on the merits and without costs.

E. Reserve and retain jurisdiction herein for the purpose of entertaining an application for the modification of the Judgment (pursuant to the provisions of Paragraph II I hereof), for the purpose of considering an application for costs and counsel fees (pursuant to the provisions of Paragraph VII hereof), or otherwise for the construction or enforcement of the Judgment.

V. In the event that this settlement shall, for any reason, not be finally approved and consummated, then this Stipulation of Settlement shall have no further

effect; shall be null and void, and it and all proceedings connected therewith (including the approval and establishment of a temporary settlement class) shall be without prejudice to the rights of any party, and shall not be used in any subsequent proceeding, whether in this action or in any other action.

VI. This Stipulation of Settlement is entered into as a compromise of a disputed claim. Defendants do not hereby admit any of the allegations of plaintiffs' Complaint, or Amended Complaint, or Second Amended Complaint, or admit any liability to plaintiffs, to members of the alleged class, the temporary settlement class, or to any other person, or admit any wrongdoing or misconduct of any character.

VII. The question of plaintiffs' right to costs and counsel fees has not been resolved by this stipulation, and plaintiffs are free to apply to the Court for resolution of this matter.

Dated: New York, New York
~~February~~ March 8, 1973.

For the Plaintiffs, by their Attorneys: Jack Greenberg, Elizabeth B. DuBois, George Cooper and Jeffrey A. Mintz

By: Elizabeth B. DuBois
Elizabeth B. DuBois

For the Defendant, Board of Examiners, by its Attorneys: Kaye, Scholer, Fierman, Hays & Handler

By: _____
Saul Z. Cohen

For the Defendant, Board of Education, by its Attorney: The Corporation Counsel of the City of New York:

By: _____

For the Defendant, Chancellor of the City School District of the City of New York:

By: Harry A. Scribner

1. Principal Junior High Schools
2. Administrator Bureau of Child Guidance
3. Assistant Director of English (English as a Second Language)
4. Supervisor Health Education
5. Supervisor of Home Economics
6. Assistant Director Social Studies
7. Assistant Director Business Education
8. Assistant Administrative Director (Closed Examination)
9. Director Bureau for Children with Retarded Mental Development
10. Supervisor Early Childhood
11. Supervisor Programming Instructional Radio
12. Supervisor Programming Production Instructional Television
13. Supervisor of Art
14. Chairman of Social Studies Day High Schools
15. Chairman of Speech Day High Schools
16. Principal Day High Schools
17. Supervisor of Music
18. Chairman of Department Automotive Trades Day High Schools
19. Chairman of Department Cosmetology Day High Schools
20. Chairman of Department Home Economics Day High Schools
21. Chairman of Department Printing Day High Schools
22. Chairman Department Related Technical Subjects (Biology and Chemistry)
23. Chairman of Department Related Technical Subjects (MSE)
24. Supervisor Industrial Arts
25. Chairman of Department Distributive Education Day High Schools
26. Director of English
27. Principal Junior High Schools (Closed Examination)
28. Assistant Principal (Administration) Day High Schools
29. Director of Cooperative Education
30. Principal in Day Elementary Schools
31. Assistant Principal of a School for the Deaf
32. District Supervising Attendance Officer
33. Supervisor of Education of the Physically Handicapped (Other than the Visually or the Acoustically Handicapped)
34. Supervisor of Education of the Visually Handicapped
35. Assistant Principal (Teacher Trainer) in Intermediate and Junior High Schools - Language Arts and Social Studies
36. Assistant Principal (Supervision) in Nursing in Day High Schools
37. Director of Art
38. Assistant Director of Music
39. Assistant Principal (Supervision) in Biology and General Science in Day High Schools
40. Assistant Principal (Supervision) in Mathematics in Day High Schools
41. Assistant Principal (Teacher Trainer) in Intermediate and Junior High Schools - Mathematics and Science
42. Assistant Principal (Supervision) in English in Day High Schools

Name of Examination	Announcement Date
1. Assistant Principal (Supervision) in Physical Sciences and General Science in Day High Schools	10/8/70
2. Director, Bureau of Attendance	12/21/70
3. Director, Bureau for Hearing-Handicapped Children	9/16/70
4. Assistant Director of the Bureau for Hearing-Handicapped Children	9/16/70
5. Supervisor of Classes for Children with Retarded Mental Development	3/9/70
6. Assistant Director of the Bureau for Visually Handicapped Children	9/16/70
7. Principal of a School for the Deaf	12/7/70
8. Director of All-Day Neighborhood Schools	3/9/70
9. Supervisor of School Library Service	12/2/70
10. Assistant Principal (Supervision) in Maritime Trades in Day High Schools	9/16/70
11. Assistant Principal (Supervision) in Metal Trades in Day High Schools	9/16/70
12. Assistant Principal (Supervision) in Music in Day High Schools	12/21/70
13. Assistant Principal (Supervision) in Fine Arts in Day High Schools	6/24/70
14. Principal of an Occupational Training Center - School for Mentally Retarded Young Adults	4/7/71
15. Principal of a Special School for Physically Handicapped Children in Hospitals and Convalescent Homes	4/7/71
16. Principal of a Special School for Socially Maladjusted, Emotionally Disturbed, and Neglected and Dependent Children	4/7/71
17. Principal of a Day High School	4/7/71
18. Assistant Principal (Supervision) in Health and Physical Education in Day High Schools (WOMEN ONLY)	9/16/70
19. Assistant Principal (Supervision) in Health and Physical Education in Day High Schools (MEN ONLY)	3/30/71
20. Director of Business Education	12/18/70
21. Assistant Principal (Supervision) in Stenography and Typewriting in Day High Schools	3/29/71

SUPPLEMENT TO SPECIAL CIRCULAR NO. 30, 1972-1973

BOARD OF EDUCATION OF THE CITY OF NEW YORK
OFFICE OF THE CHANCELLOR

January 4, 1973

TO: COMMUNITY SCHOOL BOARD CHAIRMEN, ALL SUPERINTENDENTS, EXECUTIVE DIRECTORS, DIRECTORS, HEADS OF BUREAUS AND PRINCIPALS OF ALL DAY SCHOOLS

Ladies and Gentlemen:

REGULATIONS GOVERNING THE ASSIGNMENT OF ACTING SUPERVISORS

Special Circular No. 30, dated October 25, 1972, applies to all budgeted supervisory positions for which a New York City license exists. The procedures set forth in Special Circular No. 30 are to be used by all district and central headquarters offices in selecting personnel for assignment or for promotion to all supervisory (pedagogical) positions whether the position is located in a school, district office or a central headquarters office.

The transfer plan of the collective bargaining agreement currently in effect is applicable if the supervisory position is located in a school.

Very truly yours,

HARVEY B. SCRIBNER
Chancellor

Appendix C

BOARD OF EDUCATION OF THE CITY OF NEW YORK
OFFICE OF THE CHANCELLOR

October 25, 1972

TO: COMMUNITY SCHOOL BOARD CHAIRMEN,
ALL SUPERINTENDENTS,
EXECUTIVE DIRECTORS, DIRECTORS,
HEADS OF BUREAUS AND
PRINCIPALS OF ALL DAY SCHOOLS

Ladies and Gentlemen:

REGULATIONS GOVERNING THE ASSIGNMENT OF ACTING SUPERVISORS

These regulations incorporate and supersede regulations contained in SPECIAL CIRCULAR NO. 42, 1971-1972 dated January 17, 1972 and the Supplement to Special Circular 42, 1971-1972 dated May 31, 1972. They set forth required procedures and standards governing the assignment of acting supervisory personnel. They also contain suggested procedures which will help Community School Boards and Central Units to insure that the selection process is equitable and is based on the principles of merit and fitness. Collective bargaining agreements may also contain provisions pertinent to the selection process.

I. In accordance with the resolution, Assignment of Acting Supervisory Personnel, adopted by the Board of Education on October 6, 1971, the following regulations shall apply effective January 17, 1972 in the assignment of acting supervisory personnel in the city school district when such assignment is for a period of three calendar months or more.*

A. This circular is intended to require fair and objective procedures to be developed for selecting candidates where a position is actually being filled. The three month rule is not intended to require full notice and selection procedures in the cases where positions are being filled temporarily (as for sick leave, sabbaticals, etc.) Nor is it intended to rush bona fide selection procedures that may take longer than three months to complete.

B. Assignment of persons to supervisory positions on an acting basis in order to fill vacancies temporarily for emergency periods of less than three calendar months may be made by appropriate authorities in accordance with previously established policies and regulations. The temporary filling of an opening caused by the absence of the incumbent on sick leave, sabbatical, etc. may continue to be filled, as in the past, by appropriate local selection procedures and without reference to the procedures outlined herein.

C. Assignments made prior to January 17, 1972 and which complied with applicable policies and regulations, and assignments made on the basis of selection processes underway as of that date, are not affected by the regulations contained herein.

* For this purpose, a position shall be declared to be a vacancy when a person leaves a budgeted position permanently as in the case of transfer, resignation, retirement, terminal leave, leave in lieu of sabbaticals, promotion, termination or death.

(Continued on Reverse Side)

II. The system of assignment which shall pertain to assignments to vacancies exceeding three calendar months:

A. Is a process which is subject to continual review and periodic refinement and improvement at both the citywide and the community levels.

B. Is dependent on consultation with parents and staff at both the citywide and the community levels.

C. Consists of citywide standards developed and promulgated by the Chancellor as minimum citywide requirements, and community standards developed by the individual Community School Boards and appropriate Central Units (in the case of centrally operated schools).

III. Required Procedures and Standards

A. The following citywide standards shall apply:

1. Eligibility. Candidates are eligible if they possess appropriate st[illegible] certification or if they meet eligibility requirements for the most recent appropriate supervisory examination.

2. Public Notice of Vacancy. A minimum of 30 days public notice of the vacancy to be filled is required for the purpose of notifying potential candidates of vacancies and allowing reasonable time for the filing of applications.

a. The advertisement or notice shall include the eligibility requirements for the position or, if this is not possible because of space, costs or other limitations, a clear indication of the place where the requirements may be obtained.

b. The Office of Personnel shall issue circulars listing vacancies to all school heads, Community School Boards and Community Superintendents, and shall also make use of other centrally-issued publications for this purpose.

c. All vacancies shall at a minimum be posted centrally by the Office of Personnel at 110 Livingston Street and at 65 Court Street.

d. The principal of each school under central jurisdiction shall post all vacancy notices received on the official bulletin board(s) of the school.

e. Vacancies shall be posted in each district office as well as in all schools. The posting of all official circulars upon bulletin boards in order to make them available to staff is required under the terms of various collective bargaining agreements.

3. Parent Associations. Assigning authorities shall involve Parent Associations in the selection process in accordance with the policy statement of the Board of Education entitled Parent Associations and the Schools.

4. Interviews. A minimum of three eligible candidates shall be interviewed.

5. Selection Criteria:

   a. shall be developed in consultation with parents, staff and others agreed upon by the Community School Board or Central Unit.

   b. shall be available in written form after agreement is reached.

   c. shall be related to job competence.

   d. shall insure that there is no discrimination because of age, race, creed, color, national origin, sex, union or non-union affiliation, and shall conform to public law.

   e. are intended as a framework for overall use on a district-wide basis. Community School Boards and Central Units may develop additional, specific criteria for individual schools.

6. Written Procedures:

   a. shall be available to the public, on request, after adoption at a public meeting of the Community School Board or, for schools under central jurisdiction, upon approval by the Chancellor.

   b. shall be distributed periodically to Parent Associations, community groups and other interested parties to insure that all are kept apprised of current regulations.

7. Candidates. Each applicant, upon request, shall be informed of eligibility requirements and job descriptions prior to the submission of resumes and prior to the holding of interviews.

8. Equal and Fair Consideration. All persons interested in filling supervisory vacancies whether application is made through transfer procedures, on an acting basis, or, in the case of elementary principal vacancies, as auxiliary principals, shall be given equal and fair consideration by the screening and interviewing committees. In essence, the same procedures shall apply to all candidates for the purpose of fairness.

B. Community Standards. Community School Boards and appropriate Central Units shall develop written procedures governing the assignment of acting supervisory personnel, which procedures may be modified from time to time. Such procedures and all modifications shall be filed for review with the Chancellor's Advisory Council on the Selection of Acting Supervisory Personnel, and are subject to approval by the Chancellor to ensure compliance with minimum standards and applicable laws, policies and agreements.

(Continued on Reverse Side)

B. Community Standards (Continued)

Such procedures shall include at least the following:

1. General description of procedures and basic criteria to be used in making selections. (Criteria may vary according to the nature of the supervisory position and community priorities, but should include such factors as the candidate's teaching record relative to student growth and achievement; empathy for children and youth; the recommendations of supervisors, peers and students; evidence of community involvement; evidence of ability to translate general community objectives into educational programs; evidence of supervisory ability (in both school and non-school activities); evidence of receptivity to new concepts and ideas, and performance in interviews and such other evaluative processes as may be used.)

2. Description of performance objectives for the position to be filled. Such descriptions shall be made available to each candidate before the interview. (Objectives may vary in number and content according to the nature of the vacant position and community priorities, but should include such objectives as leadership of staff; development of productive and harmonious student-staff relationships; involvement of parents and community in planning, implementing and evaluating educational programs; use of available non-school resources and institutions for educational purposes; provision of varied learning opportunities to meet the individual needs of students; and clarification of staff roles for the purpose of fixing responsibility and accountability.)

3. Description of a performance-based method for evaluating acting supervisors within six months of date of assignment and at least annually thereafter. Such evaluations shall include a fair assessment of on-the-job performance against the performance objectives established for the position. Copies of all evaluation reports shall be provided the supervisor so evaluated. (Evaluation instruments may include such techniques as on-the-job observation by superiors; visits by designated professionals from outside the school or school district; the assessment of peers, parents and students, etc.).

IV. Suggested Procedures for the Selection of Acting Supervisory Personnel.

A. Procedures should include criteria for screening out ineligibles as well as for selecting those who will be given further consideration.

B. Notification of Vacancy

1. Notification of the vacancy should be made by the Community Superintendent to the Community School Board, the Office of Personnel and the Parent Association of the school involved.

2. Notification of the vacancy should be made at the next following public meeting of the Community School Board.

3. The Parent Association of the school involved should make the announcement of vacancy at the first open meeting following the initial notification of the vacancy or through Parent Association newspapers or flyers.

C. Development of Selection Criteria for Specific Vacancy

1. These criteria should include citywide standards, provide for district-wide needs and relate to specific priorities of the individual school where the vacancy exists. (See Section III above.)

D. Advertising the Vacancy

1. The position should be advertised in accordance with agreements between the Council of Supervisors and Administrators and the Board of Education.

2. Public notice should include the use of centrally-issued circulars, bulletin boards, announcement at open meetings of the Parent Association or through Parent Association newspapers and flyers.

3. This notice should state where applicants may receive a copy of the job description, eligibility requirements, selection criteria and standard application form. It should state the deadline for receipt of applications and where applications should be filed. This information should be made available promptly to all applicants and other interested persons, on request.

E. Suggested Additional Media For Use By Community School Districts

1. Newspapers of general circulation, ethnic and local press and other media

2. Civil Service Newspapers: The Chief, The Civil Service Leader

3. Appropriate professional journals

4. Community and school publications, conference notes, PA Bulletins, etc.

F. Recruitment

1. Procedures should be developed for broad and intensive recruitment, including the following:

a. Communicating with college placement directors

b. Advertising in media other than those outlined in item D. and E. above

c. Working through community organizations

d. Utilizing professional placement services

e. Making use of conventions and conferences

f. Utilizing the resources of the Bureau of Educational Staff Selection at Central Headquarters

2. The Community School Board and the Community Superintendent have the right to submit additional names to the selection committee for consideration.

(Continued on Reverse Side)

G. Selection Committee

1. The selection committee named by the Community School Board to screen resumes, interview candidates, and make recommendations to the Community School Board should include the Community Superintendent or his designee, representatives of the Community School Board and representatives of the Parent Association of the school involved. When an assistant principalship is being filled, the principal of the school should be included on the selection committee. For other positions, persons employed in schools in which vacancies exist should not be permitted to serve on the selection committee; they may, however, be consulted by the selection committee.

2. All applications and other written communications from candidates should be referred to the selection committee.

3. The selection committee should decide which community organizations or students, if any, are to be included on the committee. (See "Parent Associations and the Schools.")

H. Initial Screening Process by Designees of the Community School Board

1. Applicants should be provided confidentiality in all matters related to job applications.

2. The Community Superintendent should review resumes and applications.

3. A check list should be used for the purpose of insuring that minimum requirements are met. (See Attachement A)

4. Resumes should be examined against the established selection criteria.

I. Interviewing Process

1. Written records should be made of each interview (See Attachment B).

2. Following the close of interviews, the selection committee should discuss the merits of all applicants interviewed.

3. The selection committee should recommend at least 3 names to the Community Superintendent.

4. The Community Superintendent should submit the names of finalists to the Central Office of Personnel for a final eligibility check.

5. The Community Superintendent should select from among the finalists and submit his recommendation to the Community School Board.

6. If the choice of the Community School Board is not from among those names submitted by the selection committee, a meeting should be arranged with the committee to discuss the reasons for the Board's choice. This should be done prior to the public meeting at which the Community School Board votes on the matter as required by law.

V. Services Provided by Central Headquarters

Community Boards wishing to avail themselves of assistance provided by the Office of Personnel should contact:

Dr. Gerald Brooks, Director
Bureau of Educational Staff Selection
65 Court Street
Brooklyn, New York 11201
Phone: 596-8060

The Bureau of Educational Staff Selection is available for consultation and advice on the use of advertising media, information regarding vacancies, use of bulletin boards and special circulars, etc.

VI. The Chancellor's Advisory Council on the Selection of Acting Supervisory Personnel shall:

A. Act as the agent of the Chancellor in providing consultation with citywide groups and representatives on citywide standards and related matters.

B. Advise Community School Boards and appropriate Central Units, on their request, in the development of community standards or clarification of related matters.

C. Promulgate model procedures and such other information as may be useful to Community School Boards and appropriate Central Units.

D. Make recommendations to the Chancellor for improvement of citywide standards.

E. Make recommendations to the Chancellor regarding the approval of community standards.

F. Hear and consider such complaints as the Chancellor may direct, and provide the Chancellor with appropriate recommendations.

G. Periodically review the validity of all procedures.

Very truly yours,

HARVEY B. SCRIBNER
CHANCELLOR

ATTACHMENT A

Suggested Check List for Initial Screening by Community Superintendent

COMMUNITY SCHOOL DISTRICT #____

Position Sought_____ School Where Vacancy Exists_____

Date of Screening_____

Name of Applicant_____ Male_____ Female_____

Complete Mailing Address_____

_____

_____

Date application was received_____

Does applicant meet minimum eligibility? Yes_____ No_____

Teaching experience: No. of years_____

Supervisory experience: No. of years_____

Preparation:

_____ Meets the requirements for the most recent appropriate supervisory examination.

_____ Holds a New York State permanent certificate for school administrators and supervisors.

Sample criteria for a specific vacancy should be developed according to the needs of each school.

____ Experience on school level of vacancy

____ Experience with a specific educational innovation

____ Broad, general experience in different positions

____ Experience outside the public schools

____ Educational background commensurate with the job

____ Participation in professional conferences

____ Membership in professional organizations

____ Community affiliations

____ Evidence of skill in teaching

____ Evidence of skill in administration

____ Evidence of ability to establish rapport with parents, teachers and children

ATTACHMENT B

Suggested Interview Record 152a

INTERVIEW RECORD

FOR POSITION AS_____

SCHOOL WHERE VACANCY EXISTS _____ CSB#_____

DATE OF INTERVIEW:_____

TIME: FROM_____A.M. TO:_____A.M.

_____P.M. TO:_____P.M.

PLACE OF INTERVIEW:_____

A. PERSONAL DATA

1. NAME OF APPLICANT:_____FEMALE___ MALE___

DATE OF BIRTH_____

2. PRESENT POSITION:_____

3. IS APPLICATION ON FILE? YES___ NO___

4. TO WHOM WAS APPLICATION SUBMITTED? (NAME AND POSITION)

_____

_____

5. DATE SUBMITTED:_____

6. BASIS ON WHICH APPLICANT WAS CALLED FOR INTERVIEW.

a. AT REQUEST OF SELECTION COMMITTEE_____

b. ON BASIS OF TRANSFER PLAN_____

c. AT REQUEST OF COMMUNITY SCHOOL BOARD_____

d. AT REQUEST OF COMMUNITY SUPERINTENDENT_____

e. OTHER_____

7. Does applicant meet all requirements for position?

Yes____ No____

If yes, by what standard?

State Certification_____ Appropriate Board of Examiners' Announcement_____

If no, explain

_____

_____

_____

_____

ATTACHMENT B - Page 2

B. Interview Data

1. Members of selection committee present (Names and positions)

Chairman:_____

Co-Chairman:_____

Others:_____

_____

_____

_____

_____

_____

2. Observers present:_____

_____

_____

_____

3. Recorder (Name and Position)

_____

_____

Is interview being taped? Yes____ No____

How is record of interview being kept?

4. Number of applications scheduled for interview this session:_____

Order of interview of this applicant:_____

5. Other comments:

_____

_____

_____

_____

_____

_____

_____

_____

6. Recommended for additional interview. Yes___ No____

7. Rejected by vote of_____in favor

8. Name to be submitted to Community Superintendent for nomination.

Yes____ No____

ATTACHMENT B - Page 3

9. Summary of Interviewers' Rating Forms

(0 is the lowest rating; 5 is the highest rating)

C. Professional Characteristics

	0	1	2	3	4	5
1. performance record relative to student growth and achievement.						
2. evidence of community involvement.						
3. recommendations of supervisors, peers and parents (has gained the approval and respect of his colleagues and his professional superiors)						
4. evidence of supervisory ability in both school and non-school activities.						
5. evidence of ability to translate general community objectives into educational programs.						
6. evidence of receptivity to new concepts and ideas.						
7. satisfactory performance in interviews and ~~such~~ other evaluative processes as may be used.						
8. evidence of having gained the confidence and cooperation of parents.						
9. demonstrated ability to relate to people from all backgrounds.						
10. evidence of awareness of social, educational, political, economic and urban issues.						
11. commitment to and understanding of high standards of learning						
12. general philosophy of education						
13. knowledge of current issues and practices in education						
14. evidence of professional growth (involvement in professional activities, membership in organizations, attendance at conferences, etc.)						
15. views on patterns of school organization (e.g., Open Classroom, Heterogenous grouping, departmentalization)						

ATTACHMENT B - Page 4 (Continued from Professional Characteristics)

D. Personal Qualities	0	1	2	3	4	5
1. empathy for children and youth						
2. objectivity						
3. critical thinking						
4. enthusiasm						
5. sense of humor						
6. personal maturity						
7. warmth and understanding						
8. diplomacy						
9. flexibility						
10. commitment to public education						
11. appearance						
12. voice and speech quality						
13. poise						
14. ability to establish rapport						
15. ability to defend point of view						
16. ability to demonstrate leadership qualities						

Letter dated April 2, 1973, from
Leonard Bernikow to Judge Mansfield

The City of New York

LAW DEPARTMENT

MUNICIPAL BUILDING, NEW YORK, N.Y. 10007

157a

NORMAN REDLICH, Corporation Counsel

April 2, 1973

Hon. Walter R. Mansfield
Judge, United States Circuit
Court of Appeals
United States Courthouse
Foley Square
New York, N.Y. 10007

Re: Chance, et al., v. Board of Examiners, et al.,

Dear Judge Mansfield:

This letter is submitted on behalf of our clients, the New York City Board of Education, to set forth their position regarding the proposed stipulation of settlement in the above captioned action. This stipulation is to be submitted to your Honor for consideration on April 2, 1973.

In brief the Board of Education is opposed to the stipulation in its present form as a means of resolving this litigation. There are two reasons for this position: a) The stipulation provides only an additional interim procedure in lieu of the present interim procedure, Circular No. 30, which has been found to be workable, and b) The stipulation appears to violate several basic state law considerations which need not be violated or vitiated in any way even if the claims asserted in this litigation are correct. In view of the importance of this matter we will deal with each of the above in greater detail.

Firstly, annexed to the stipulation (as schedule C) is a copy of special circular No. 30-1972-73 entitled "Regulations Governing the Assignment of Acting Supervisor". This circular and its predecessors were issued to meet the need for supervisory personnel during the pendency of this litigation after the previous procedures were temporarily enjoined.

The circular provides a means for selecting supervisory personnel for appointment to both Community Board and Central Board. It does not have a fixed termination date, thus the procedures set forth therein are operative until this litigation is terminated.

The circular resolved the serious problem of satisfying the need for qualified persons to be appointed during the pendency of this suit. The proposed settlement merely offers an additional alternate "interim" solution. The stipulation in no way resolves the merits of this litigation in that there is no provision relating to what criteria and manner of testing for supervisors can be followed in the future. In the interest of an orderly administration of the New York City school system it is imperative that any settlement of this action promptly set forth the procedure to be followed that can be deemed consistent with constitutional requirements. The lack of such specific hiring standards fosters confusion and devisiveness in the school system. And, the transition to a permanent procedure necessarily becomes more difficult the longer this interim procedure is allowed to continue.

Secondly, the stipulation appears to contravene a legitimate state policy i.e., that appointments in the public service be based on "merit and fitness". Recently the Court of Appeals of the State of New York reaffirmed the need for examinations which determine merit and fitness prior to an individual receiving tenure or license in the New York City School System, (Board of Education of the City of New York v. Nyquist, ___N Y 2d ___ N.Y.L.J., 3-12-73, p. 1, co. 8). In that case Chief Judge Fuld looked to the instant litigation as a possible source for the emergence of new testing procedures for supervisory personnel. The Board of Education shares that hope and is willing to work towards such an objective consistent with constitutional standards.

It is clear that testing per se is not the claimed wrong herein but only that the nature of the tests heretofore violated plaintiffs' rights. Thus there is no necessity to completely abandon all effort to devise a test that meets constitutional standards by which permanent appointments can be made in accordance with the state's policy of "merit and fitness". It has never been argued in this case by plaintiffs that adherence to "merit and fitness" principles of proper examinations would nonetheless violate plaintiffs' 14th amendment rights.

In summary it is the position of the Board of

Education that the stipulation does not bring this case any closer to the final resolution that the interests of the school system demand in terms of appropriate examination procedures.

We respectfully indicate that an added infirmity is that the proposed procedures could continue in operation for an inordinately long period of time since no time is fixed within which permanent procedures are to be established. Indeed the present interim procedures have been in effect for a considerable period of time.

In closing the Board is extremely interested in contributing to the resolution of the problem of permanent procedures consistent with federal constitutional criteria as well as within the overall requirements of "merit and fitness" established by state law.

The Board's objective is consonant with its statutory duty set forth in Educ. Law §2554, 2590-g. In imposing the duty upon the Board, the law also imposes the burden of maintaining the orderly administration of a school system servicing over one million children.

Respectfully yours,

Leonard Bernikow
Assistant Corporation Counsel
in Charge of the Division of
General Litigation

CC:

Elizabeth DuBois, Esq.
Saul Z. Cohen, Esq.

Letter dated April 12, 1973 from Saul Z.
Cohen to Judge Mansfield

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1 3a
April 12, 1973.

Hon. Walter R. Mansfield
Judge, United States Circuit
Court of Appeals
United States Courthouse
Foley Square
New York, N.Y. 10007

Re: Chance et al v. Board of Examiners et al.

Dear Judge Mansfield:

This letter is in response to the letter dated April 2, 1973 submitted on behalf of the Board of Education by Leonard Bernikow, Assistant Corporation Counsel. Mr. Bernikow's letter raises two objections to the Stipulation of Settlement submitted with my letter of April 2, 1973.

1. "The stipulation provides only an additional interim procedure in lieu of the present interim procedure, Circular #30, which has been found to be workable, ..." and

***

"...the proposed procedures could continue in operation for an inordinately long period of time since no time is fixed within which permanent procedures are to be established...".

2. "The stipulation appears to violate several basic state law considerations...".

With respect to the second objection, there is no doubt that the equitable power of a Federal Court extends to suspending the operation of state law in order to make an effective decree in a case such as this. Where, as in this case, the suspension of state law is for a period of time designed to permit the parties to comply with the state law in a constitutional manner, the power of the Federal Court can hardly be questioned.

With respect to the Board of Education's objection concerning the "inordinately long period of time" that the temporary procedure can continue, the defendant, Board of Examiners, would be quite willing to discuss with the Board of Education an appropriate limitation on this time period. Unfortunately, neither the views of the plaintiffs nor those of the Board of Examiners on this subject have been sought.

I believe it would be most helpful in resolving this matter if the Court would schedule a conference so that the parties could discuss these differences. In my judgment, the differences lend themselves to practical solutions which are a preferable alternative to a lengthy litigation.

Very truly yours,

S.Z. Cohen

SZC:cv

cc: Mrs. Elizabeth DuBois
Leonard Bernikow, Esq.

Letter dated April 16, 1973, from
Harvey B. Scribner, Chancellor, to
Judge Mansfield

BOARD OF EDUCATION
OF THE CITY OF NEW YORK
110 LIVINGSTON STREET
BROOKLYN, N.Y. 11201

HARVEY B. SCRIBNER
CHANCELLOR

164a

April 16, 1973

Hon. Walter R. Mansfield
United States Court of Appeals
United States Courthouse
Foley Square
New York, N. Y. 10007

Re: Chance, et al. v. Board of Examiners, et al.

Dear Judge Mansfield:

As a defendant in this matter, I wish to convey to you my views on the proposed stipulation of settlement in this case. The views of the Board of Education have been transmitted to you by the Corporation Counsel. I wish to note, for your information and consideration, that my views on this proposed stipulation do not coincide with the views of the central Board of Education, also a defendant in this matter, and I do not share the position of the Board conveyed to you by letter dated April 2, 1973, from the Corporation Counsel. Accordingly, I have requested the Corporation Counsel to submit this letter to you.

I have considered with care the proposed stipulation and respectfully urge the Court to act favorably on it. My position is based on the following considerations:

1. The stipulation would strengthen and improve the existing procedures for the selection of supervisors in the public schools of New York City. In particular:

a. The stipulation would permit Community School Boards and Central Units to make regular appointments instead of acting assignments where criteria are met, thus producing a sense of stability which acting assignments by definition do not produce.

b. The stipulation is firmly rooted in the concept of merit and fitness, a concept which is Constitutionally and morally required and which I obviously endorse. The present selection procedure, described in Special Circular 30, 1972-73 ("Regulations Governing the Assignment of Acting Supervisors"), and supplements to it, explicitly states that the regulations are

designed to ensure that "the selection process is equitable and is based on the principles of merit and fitness." The proposed stipulation, in my judgment, is similarly designed.

c. The stipulation would settle this matter, and thus permit concentrated work by the Board of Examiners and other interested parties on a revised system of examination and selection based on principles of fairness, job-relatedness, and performance evaluation. Such a task will be time-consuming, and it is more likely to take place with the critically necessary concentration, it would seem to me, if the present matter is disposed of in the manner proposed in the stipulation.

d. The stipulation would permit continuation of the kind of selection process described in Special Circular 30 which is in keeping with the needs of a decentralized school system and which places emphasis on the involvement of parents in the selection process, the development of selection criteria before selection, and the existence of on-the-job performance evaluation following selection. These elements, in my judgment, are critical to the selection of staff for schools, especially at the supervisory level.

2. The stipulation would in no way violate or avoid the Constitutional requirement that appointments and promotions in the civil service be made according to merit and fitness "to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive." The questions, it seems to me, are, first, what is practicable and, second, how does one interpret the terms "examination" and "competitive."

It is clear on the basis of the history of education in New York State, including present legislation, that the Legislature, the courts, and the Commissioner of Education have determined that it is not practicable to administer written tests to prospective teachers and supervisors on a statewide basis. With the exception of the school systems of the cities of Buffalo and New York, the Constitutional mandate is satisfied by a system of certification on the basis of the individual's record of academic training and professional experience.

I see no basis for interpreting the Constitutional provision for competitive examinations where practicable as an inflexible mandate. In education, the needs of children vary widely from place to place and time to time, and it is extremely difficult to predict the future effectiveness of a prospective principal or other supervisor on the basis of a written test. As one who has worked a lifetime in schools and who has served as a superintendent and educational administrator for the past twenty-seven years, I very much

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share the doubt expressed in your opinion of July 14, 1971, as to whether

> "examinations could be constructed that would be valid for selection of Principals and other supervisory personnel, since we viewed their duties as being executive and complex in nature, with the success of a Principal in a given school depending not so much on his knowledge of duties and educational content of courses given by his subordinates as on such intangible factors as leadership skill, sensitivity to the feelings and attitudes of teachers, parents and children, and ability to articulate, to relate, to organize work, to establish procedures, to promote good community relations, to induce subordinates to accept directions, to work cooperatively, to criticize without creating unnecessary animosity or ill-will, to analyze and evaluate administrative problems, to take decisive action when required, to operate under stress, to initiate and promote new programs and to instill a feeling of confidence." (Slip opinion, pp. 29-30).

Just as the Constitutional requirement is met elsewhere in the State through a system of State certification and local selection, so would the terms of the proposed stipulation satisfy the Constitutional requirement by incorporating existing selection procedures required by Special Circular No. 30 where the minimum eligibility is State certification and adding to them an evaluation system administered by the Board of Examiners based on on-the-job performance. The existing procedures already are geared specifically to merit and fitness in a decentralized school system, and the required elements of the selection procedures which apply citywide, e.g., eligibility standards, public notice of vacancies, involvement of parent associations, a minimum number of interviews, development of selection criteria and written procedures, and the equal and fair consideration of all candidates, yield a competitive selection system in which the individual ultimately selected is chosen on the basis of an examination of many factors, both personal and professional, in the context of the needs of the school. The stipulation would add strengthened procedures for evaluation leading to regular appointments.

3. The stipulation, contrary to the views of the central Board of Education, represents more than "an additional alternate 'interim' solution." While admittedly interim, pending the development of a new selection system, the stipulation would permit regular appointments where none are permitted at the present time. Because of this significant factor, and because the stipulation would have the approval of the same Court which enjoined the former selection system, the stipulation clearly would yield a system of appointment with a significantly greater aura of permanency and stability than the present system of acting assignments. It is worth noting

that the present central Board of Education is itself an "interim" board, yet it has functioned. By the same reasoning, I have no fear that an "interim" status would diminish the effectiveness of the appointment system proposed in the stipulation, or impair the ability of the school system and the Board of Examiners to manage it.

It is my position that, of the alternatives available at the present time, the proposed stipulation represents the most hopeful and potentially the most productive choice. Though an interim step, it would produce more stability in the school system than is available from a system limited to acting assignments. It would avert the necessity for further litigation at this point. It would permit an immediate beginning on the construction of a new permanent appointment system. And it would avoid the future development of an unstable administrative state of affairs in which acting supervisory assignments in the New York City schools gradually come to outnumber permanent appointments, while the parties to this suit work for additional months or years to devise a "permanent" solution. While there always are risks involved in change, this stipulation would be a useful step in the right direction, i.e., a step toward a more permanent system of selection of supervisors for the decentralized school system of New York City--free of the taint of real or imagined discrimination, rooted in the concept of merit and fitness, and based on the critical objectives of flexibility for appointing authorities, standards to guarantee fairness in selections, and the assessing of actual performance of principals and other supervisors for the benefit of students.

Sincerely,

Harvey B. Scribner
Chancellor

HBS:al

Plaintiffs' Notice of Motion dated April 23, 1973, together with exhibits and supporting affidavit of Elizabeth B. DuBois (plus exhibits), sworn to April 7, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - 169a- - - -

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs,

v.

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

NOTICE OF MOTION

CIVIL ACTION NO. 70 Civ. 4141 (W.R.M.)

- -

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Elizabeth B. DuBois, sworn to April 23, 1973, and upon all prior proceedings held, and papers filed in the above-captioned case, the undersigned will make application to this Court, at Room 2604, United States Courthouse, Foley Square, New York, New York, on the 3rd day of May, 1973, at 10:00 a.m. or as soon thereafter as counsel can be heard, for entry of a default judgment in favor of plaintiffs and against defendant Board of Education and against defendants Murry Bergtraum, Isaiah E. Robinson, Jr., Mary E. Meade, Seymour P. Lachman, and Joseph Monserrat, individually and in their capacities as members and officers of the Board of Education, Harvey B. Scribner, individually and in his capacity as Chancellor of the City School District of the City of New York, and Frederick H. Williams, individually and in his capacity as Executive Director of the City School District of the City of New York.

Plaintiffs make this application on the ground that default has been entered against said defendants for failure to answer or otherwise defend as to the complaint of plaintiffs, a copy of which is attached hereto as Exhibit A. The certificate

of the clerk of this court as to the entry of default is attached hereto as Exhibit B.

Dated: New York, New York
April 23, 1973

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JEFFREY MINTZ
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10 Columbus Circle
New York, New York 10019
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GEORGE COOPER
435 West 116 Street
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Attorneys for Plaintiffs

To:

Saul Z. Cohen, Esq.
Kaye, Scholer, Fierman,
Hays and Handler
425 Park Avenue
New York, New York

Leonard Bernikow, Esq.
The Corporation Counsel
Municipal Building
New York, New York

EXHIBIT A -

Plaintiffs' Amended Complaint
(Printed at pp. 19a-35a)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE,
LOUIS C. MERCADO, et al.,

Plaintiffs,

v.

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

CIVIL ACTION NO.
70 Civ. 4141
(W.R.M.)

CLERK'S CERTIFICATE NOTING DEFAULT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

I Thomas E. Andrews, acting clerk of the United States District Court for the Southern District of New York, do hereby certify that docket entries in the above entitled action show that copies of the summons and complaint were served on defendant Board of Education and on defendants Murry Bergtraum, Isaiah E. Robinson, Jr., Mary E. Meade, Seymour P. Lachman, and Joseph Monserrat, individually and in their capacities as members and officers of the Board of Education, Harvey B. Scribner, individually and in his capacity as Chancellor of the City School District of the City of New York, and Frederick H. Williams, individually and in his capacity as Executive Director of the City School District of the City of New York on September 24, 1970, by Ann Wagner, pursuant to the order issued by the clerk on September 24, 1970, designating her to serve the summons and complaint, and that the second amended complaint was served on said defendants on February 23, 1971, and said defendants have failed to answer, move or plead.

The default of said defendants is hereby noted.

Date: April , 1973

Acting Clerk

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

- -

172a

BOSTON M. CHANCE,
LOUIS C. MERCADO, et al.,

Plaintiffs,

v.

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

CIVIL ACTION NO.
70 Civ. 4141
(W.R.M.)

AFFIDAVIT

- -

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ELIZABETH B. DuBOIS, being duly sworn, deposes and says:

1. I am one of the attorneys for plaintiffs in the above-captioned action, and am fully familiar with all prior proceedings and with all negotiations and other contacts between the parties in said action. I submit this affidavit in support of plaintiffs' Motion for Default Judgment.

2. Plaintiffs filed their complaint in this action in September, 1970. The named defendants included the Board of Education, its members, and the Deputy Superintendent of Schools [hereinafter referred to collectively as the Board of Education defendants]. Also named as a defendant was the Chancellor of the City School District. The individuals named were sued both in their individual and in their official capacities. Plaintiffs moved simultaneously for a preliminary injunction. In February, 1971, plaintiffs amended their complaint to include additional plaintiffs. In or about March of 1971, plaintiffs served upon the Board of Education defendants and upon the Chancellor a Request for Production of Documents (Index to the Record on Appeal No. 18)*

* References to the Record on Appeal, Appendix and Appendix Exhibit volume are to the record on appeal to the Second Circuit from this Court's decision granting a preliminary injunction

pursuant to F. R. Civ. P. 34.

3. On October 13, 1970, the Chancellor issued a statement that:

> "My position with regard to the Chance and Mercado case is that I prefer not to defend myself against the action. To do so would require that I both violate my own professional beliefs and defend a system of personnel selection and promotion which I no longer believe to be workable." (App. Ex. 18, p. 4)

The Chancellor has participated in no other way in the defense of this action to date. The only paper which has been filed on his behalf is the letter from the Chancellor to the court dated April 16, 1973. 4. The Board of Education defendants have never filed an answer to the complaint. Nor did they respond to the Request for Documents, file any motion relating to this action, or submit any defense to plaintiffs' motion.

5. Instead the Board of Education defendants took the position in October of 1970, in the only paper submitted to the court throughout the proceedings in this case indicating the Board of Education's position with respect to the defense of this action, that the examination system challenged in this action was the sole responsibility of the Board of Examiners, and the Board of Examiners should therefore satisfy the burden of defending its examination procedures. Thus the affidavit of Murry Bergtraum, dated October 26, 1970, filed on behalf of the Board of Education, states that the Board of Education's:

> "position is that the sole statutory responsibility for the administration of tests for supervisory personnel lies with the Board of Examiners."

The affidavit further states:

> "Since Education Law §2560 devolves the duty upon the Board of Examiners to administer all license examinations it is the position of the Board of Education that the Board of Examiners should satisfy the burden of defending their examination procedures."

6. The Board of Education defendants' failure to defend this action was recognized in this Court's decision of July 14, 1971, granting plaintiffs' motion, where the Court noted that: "The Board of Education has not actively opposed the motion for preliminary injunction..." (330 F. Supp. 203 at 203) The opinion of the Second Circuit affirming this Court's decision took similar note of the fact that the Board of Education defendants "did not actively oppose the motion for a preliminary injunction" (458 F. 2d 1167, at 1169).

7. During the fall of 1971 plaintiffs and the Board of Examiners engaged in numerous meetings and extensive discussions related to a possible modification of this Court's preliminary injunction to permit the implementation of a new system for the selection of supervisors in the New York City School System. (See generally Affidavit of Elizabeth B. DuBois, submitted in support of Plaintiffs' Response to Defendants' Notice of Motion, filed June 8, 1972.) The Board of Education exhibited no interest in and made no effort to become involved in those discussions.

8. Neither the Chancellor nor the Board of Education defendants appealed from this Court's decision granting plaintiffs' Motion for Preliminary Injunction, as the Second Circuit noted in its opinion (458 F. 2d at 1169).

9. On June 1, 1972, the Board of Examiners moved for a modification of this Court's Preliminary Injunction to permit the development and implementation of new examinations for supervisory positions. Plaintiffs filed a response on June 8, 1972, which specifically noted that the Chancellor and the Board of Education had had no role in the development of the Board of Examiners' proposal. See Plaintiffs' Response to Defendants' Notice of Motion, filed June 8, 1972, Memorandum p. 3: attached affidavit of Elizabeth B. DuBois, para. 11. Plaintiffs also stated that they were both "willing and anxious" (Id, Memo p. 4) to meet "not only with the newly constituted Board of Examiners but

also with the Board of Education and the Chancellor..." (Id, Dubois affidavit para. 11).

10. At the hearing on the Board of Examiners' motion on June 27, 1972, I again requested on behalf of plaintiffs an opportunity to meet with all defendants to the action to attempt to resolve problems relating to the development and implementation of a new supervisory examination system. The Court urged all parties to attempt such a resolution through discussions amongst themselves.

11. As soon as that hearing had terminated I urged the attorney representing Corporation Counsel at the hearing to communicate to the Board of Education defendants plaintiffs' request that they meet with us.

12. Despite these requests, and the Court's urging, plaintiffs received no indication of any interest in such a meeting from the Board of Education defendants or their counsel.

13. On August 1, 1972, plaintiffs' counsel sent letters both to counsel for the Board of Education defendants (attached hereto as Exhibit 1), and to counsel for the Board of Examiners (attached hereto as Exhibit 2). The letter to Corporation Counsel stated that:

> "As you know, we have for some time now been anxious to meet with the Chancellor and the Board of Education, or their representatives, to discuss possibilities with respect to modification of the court's order in the above-captioned case, and other matters looking toward a resolution of this lawsuit."

It referred to the Court's request that the various parties get together to try to resolve such issues. And it further stated:

> "We hope, therefore, that the Chancellor and the Board of Education will agree to meet with us. We are willing to meet with the parties or their representatives, individually or collectively. What we do think essential is that we start meeting as soon as possible. We are asking, therefore, that you forward our request for a meeting to the Chancellor and to the members of the Board of Education."

The letter to counsel for the Board of Examiners, a copy of which

the members of the Board of Examiners but also a joint meeting of all the parties. Thus the letter stated: 176a

> "Finally, as we indicated previously, we would like to arrange a meeting which would include not only representatives of the Board of Examiners and plaintiffs, but the Chancellor and the Board of Education as well.
>
> We are enclosing a copy of our letter to counsel for the Chancellor and the Board of Education requesting such a meeting, and we ask you to inform Messrs. Rockowitz, Greene, Williams, King and Quinones of this request as well."

14. Plaintiffs never received any response, oral or written, to its letters, from the Board of Education defendants.

15. Defendant Board of Examiners did agree to meet with plaintiffs and, on September 28, 1972, plaintiffs met with the members of the newly constituted Board of Examiners and their counsel. It was subsequently agreed that the Board of Examiners and plaintiffs would attempt to arrive at a settlement of the issues relating to the previous examination system and the establishment of a workable interim system for licensing supervisors. It was additionally agreed that a Taskforce consisting of five plaintiff representatives and five defendant representatives would be established to meet on an on-going basis to develop a new system for the selection of supervisors.

16. Plaintiffs and their representatives have attended both settlement meetings and Taskforce meetings on a regular basis since September 28, 1972. These meetings have consumed an inordinate amount of time. Approximately seventeen meetings have taken place since that date. Meetings have had an average duration of at least two to three hours. Taskforce meetings have required the attendance not only of plaintiffs' counsel, but also of the five plaintiff-representatives to the Taskforce. A great deal of additional time has been required to prepare for meetings and conduct legal and other research relating to the meetings. Plaintiffs' counsel have also spent a significant amount of time and

effort attempting to obtain a grant from a private foundation to support the work of plaintiff-representatives to the Taskforce.

17. At no time did the Board of Education defendants give any indication to plaintiffs or, to my knowledge, to the Board of Examiners, that they would like to participate in the meetings described in paras. 15 and 16 above.

18. The Board of Education defendants had constructive knowledge of and, indeed, were represented at the Taskforce meetings since one of their number, defendant Frederick Williams, Deputy Superintendent of the City School System, participated in those meetings in his capacity as the Chancellor's designee to the Board of Examiners. Since Mr. Williams' resignation his successor, Rufus Shorter, acting Deputy Superintendent, has been participating in these meetings.

19. Sometime in late December of 1972 or early January of 1973, Mr. Williams informed certain members of the Taskforce that some member or members of the Board of Education had indicated an interest in the subject of the Taskforce's discussions. Accordingly, by letter of January 11, 1973, from Mr. Williams to Mr. Joseph Monserrat, President of the Board of Education, the Taskforce invited the Board of Education to its next meeting, scheduled for January 18, 1973 (Exhibit 3, attached hereto). That meeting had been scheduled as an open meeting, to which Central Board jurisdiction school representatives and selected city-wide organization representatives had been invited to express their views on various issues relating to a possible new system for the selection of supervisors. (See the letter of invitation to such representatives, attached hereto as Exhibit 4). However, Mr. Williams' letter indicated that the Taskforce would also be interested in meeting privately with the Board of Education and the Chancellor. Thus he stated that such a private meeting was "a desirable course of action", and that this view was "shared by the Taskforce members I

20. The Taskforce received no response from the Board of Education defendants to the January 11 letter of Mr. Williams described in para. 19 above. 178a

21. In December of 1972 or early January of 1973 counsel for the Board of Examiners transmitted to Corporation Counsel a copy of the Examiners' draft proposed settlement which was submitted simultaneously to counsel for plaintiffs.

22. On or about January 29, 1973, I happened to encounter Mr. Bernikow when both of us were in court on a matter unrelated to the instant action. At that time he indicated that the Board of Education defendants had expressed interest in the subject of the settlement negotiations. He gave no indication, however, that they had any interest in meeting with plaintiffs and the Board of Examiners. I said that I would send him copies of significant documents relating to the settlement that I submitted in the future and he indicated that that was satisfactory. Accordingly, on February 8, 1973, I sent him a copy of plaintiffs' draft proposed settlement which was submitted simultaneously to counsel for the Board of Examiners. (See my letter to Mr. Bernikow, attached hereto as Exhibit 5)

23. The Board of Education defendants submitted no response to the draft proposed settlements referred to in paras. 21-22 above, nor did they indicate any interest in meeting with plaintiffs and the Board of Examiners to discuss issues related to the settlement.

24. On February 14, 1973, counsel for plaintiffs and counsel for the Board of Examiners reached agreement on a stipulation of settlement. On February 15, 1973, plaintiffs and the Board of Examiners agreed that the Board of Examiners, through one of its members, would request a meeting with the Board of Education to discuss the settlement. On February 16, 1973, counsel for plaintiffs and counsel for the Board of Examiners went to the

offices of Corporation Counsel to deliver a copy of the stipulation of settlement and to discuss it with the attorneys representing the Board of Education defendants. At that time we urged Corporation Counsel to meet again with us to discuss any problems they might have with the settlement, and to allow us to meet with the Board of Education defendants to discuss any problems they might have with it. We also indicated the urgency of resolving any problems as soon as possible.

25. Numerous additional attempts to solicit a meeting with the Board of Education were made in the following days and weeks. Thus, for example, I was informed by defendant Examiner Rockawitz that on February 27, 1973, he had requested a meeting with the Board of Education and that on March 2, 1973, Mr. Rufus Shorter, acting Deputy Superintendent of Schools, had sent a letter to the Board of Education requesting a meeting between the parties.

26. Despite the attempts described in paras. 24-25 above no response from the Board of Education was received except an indication on March 7, 1973, from Mr. Bernikow to counsel for the Board of Examiners that the Board of Education would have a position within ten days.

27. Just before the status conference held by this Court on March 13, 1973, counsel to the Board of Examiners and counsel to plaintiffs again urged Mr. Bernikow to arrange a meeting with the Board of Education defendants to discuss any problems they might have with the settlement.

28. The Board of Education defendants continued to fail in any way to respond. The first and only communication to plaintiffs of their decision to oppose the settlement consisted of mailing plaintiffs a copy of Mr. Bernikow's letter of April 2, 1973, to the Court (attached hereto as Exhibit 6.)

29. The Board of Education's participation in this case thus consists essentially of: 180a

a. an affidavit filed in October of 1970 indicating that it would leave the defense of this action to the Board of Examiners since the examination system challenged was the Examiners' responsibility; and

b. a letter submitted two and a half years later indicating that it had objections to the settlement arrived at by the parties who had spent those two and a half years litigating, appealing and negotiating the action.

30. Plaintiffs have, in my opinion, been significantly prejudiced by the Board of Education's failure to take any position with respect to the defense of this action until its decision on April 2, 1973, to oppose the settlement arrived at by plaintiffs and the Board of Examiners.

31. There is, in the first place, a limit on the resources that plaintiffs' counsel, serving without fee, can afford to devote to this case. Plaintiffs are, therefore, unable to pursue every available legal alternative simultaneously, and forced to choose only the most promising.

32. In the fall of 1972 plaintiffs were led to believe by the attitudes exhibited by the Board of Education defendants and the Board of Examiners, that negotiations with the Board of Examiners relating to settlement, and establishment of a Taskforce to develop a new examination system, would in combination constitute the most promising means of arriving at a resolution of the various issues in the case that would be in the best interests of the plaintiffs and of the City School System.

33. Had plaintiffs known or had reason to believe at that time that the Board of Education defendants intended to play an active role in the action for the first time at the conclusion of the settlement negotiations, rather than continuing to leave

the defense of the action to the Board of Examiners, it would in my opinion have been in plaintiffs' interest to have taken various steps that they did not take in the fall of 1972. Thus, for example, plaintiffs and their representatives might have refused to engage in any negotiations, or to participate in Taskforce sessions, unless the Board of Education defendants agreed to participate. And plaintiffs might have taken legal steps to obtain from the Court a final judgment on the merits.

34. If the Board of Education defendants are allowed to participate for the first time actively in the case at this stage by opposing the settlement, plaintiffs will have been irreparably prejudiced by their justifiable reliance on the Board of Education's previous failure to defend the action. This prejudice consists in part in the following:

a. The vast waste of resources represented in the time and energy spent by plaintiffs and their representatives in the extensive meetings and discussions referred to above;

b. The fact that plaintiffs would by this time have had an opportunity to obtain from the Court a judgment on the merits of this action if they had not directed their efforts and resources toward said meetings and discussions. While plaintiffs recognize that they would now be free to pursue judgment on the merits if the Board of Education defendants were permitted to oppose the settlement, plaintiffs would of course be prejudiced by the delay in obtaining a final judgment. And, as noted above, plaintiffs do not have unlimited resources to devote to this action. The extraordinary amount of time and energy devoted throughout this winter to a settlement of this case necessarily limits the resources now available to pursue other alternatives.

35. The merits of this case were thoroughly explored during the prior proceedings in this Court. The Board of Examiners, which has defended this action vigorously throughout, was in possession of the essential factual information relevant to the defense of the validity of its examination system. The Board of Education defendants did not and do not have, to my knowledge, possession of any factual information unknown to the Examiners which would tend to show the validity of that system.

36. Plaintiffs therefore request that the Court grant their motion for default judgment against the Board of Education defendants on the grounds that said defendants have failed to answer and have left to the defendant Board of Examiners the defense of this action throughout the two and one-half year long proceedings in this case.

Elizabeth B. DuBois

Sworn to before me
this 4 day of
April, 1973.

Notary Public

JACK A. MARTIN
Notary Public, State of New York
No. 31-0225
Qualified in Kings County
Cert. filed in New York County

August 1, 1972

Leonard Bernikow, Esq. 183a
Assistant Corporation Counsel
Municipal Building
New York, New York 10007

Re: Chance v. Board of Examiners

Dear Mr. Bernikow:

As you know, we have for some time now been anxious to meet with the Chancellor and the Board of Education, or their representatives, to discuss possibilities with respect to modification of the court's order in the above-captioned case, and other matters looking toward a resolution of this lawsuit.

As the most recent hearing on the defendant's motion for modification of the order, the court indicated that the parties to this lawsuit should get together to see whether it is not possible for us to work out some solution jointly.

We hope, therefore, that the Chancellor and the Board of Education will agree to meet with us. We are willing to meet with the parties or their representatives, individually or collectively. What we do think essential is that we start meeting as soon as possible. We are asking, therefore, that you forward our request for a meeting to the Chancellor and to the members of the Board of Education.

Finally, we would also like to arrange for a meeting between representatives of all the parties, including the Board of Examiners. We are enclosing a copy of our letter requesting a meeting with the full membership of the newly constituted Board of Examiners, and we ask that you inform the Chancellor and the Board of Education of this request as well.

Sincerely yours,

Jeffry A. Minta
Elizabeth B. DuBois
George Cooper

Attorneys for Plaintiffs

cc: Hon. Walter R. Mansfield
Saul Z. Cohen

August 1, 1972

Saul Z. Cohen, Esq.
Kaye, Scholer, Fierman
Hays & Handler
425 Park Avenue
New York, New York 10022

184a

Re: Chance v. Board of Examiners

Dear Mr. Cohen:

As you know, we have been anxious to meet with the full membership of the Board of Examiners ever since the Board of Education approved the appointment of Messrs. Sylvester King and Nathan Quinones to the Board. During the most recent court hearing in this case, you indicated that Messrs. King and Quinones had not yet commenced active service on the Board and, therefore, that it was appropriate for Dr. Rockowitz to act as the Board's representative and to make decisions on its behalf. We have now been informed that Mr. Quinones was sworn in as a Board member on July 17, 1972, and that Dr. King will commence service as an active Board member no later than August 7, 1972.

We assume, therefore, that you now consider yourself to be representing not merely Dr. Rockowitz and other members of the previous Board, but Messrs. King and Quinones as well. We are, consequently, asking you to forward to each of the persons listed below our request that they meet with counsel for the plaintiffs.

Dr. Murray Rockowitz
Dr. Jay Greene
Mr. Frederick H. Williams (or whomever Dr. Scribner designates to represent him on the Board of Examiners in the event that Mr. Williams is unavailable).
Dr. Sylvester King
Mr. Nathan Quinones

We would be willing to meet with these gentlemen individually, to meet with some number of them or their representatives, or to meet with them collectively as a Board.

EXHIBIT 2

If it is your view that you do not represent one or more of the above-named gentlemen, or are for any reason under no obligation to forward to them our request for a meeting, please so inform us immediately so that we may either contact them directly or, if they are represented by other counsel, deal with that counsel.

We would also appreciate your informing us as to whether Dr. Greene is still on sick leave or whether he has returned to active service as a Board member.

Finally, as we indicated previously, we would like to arrange a meeting which would include not only representatives of the Board of Examiners and plaintiffs, but the Chancellor and the Board of Education as well.

We are enclosing a copy of our letter to counsel for the Chancellor and the Board of Education requesting such a meeting, and we ask you to inform Messrs. Rockowitz, Greene, Williams, King and Quinones of this request as well.

Sincerely yours,

Jeffry A. Mintz
George Cooper
Elizabeth B. DuBois

Attorneys for Plaintiffs

cc: Hon. Walter R. Mansfield
Leonard Bernikow, Esq.

January 11, 1973

Mr. Joseph Monserrat
President

Dear Mr. Monserrat,

The enclosed document describes briefly some of the activity between plaintiffs and Board of Examiners defendants in the Chance-Mercado case. Dr. Scribner will probably want to give you a fuller report.

I has been my intention to suggest a private meeting of the Board of Education and Chancellor with the Task Force. Such a meeting is still a desirable course of action. This is shared by the Task Force members I have spoken to. However, since this Thursday, January 18th, the Task Force has invited Central Board jurisdiction school representatives and selected city-wide organization representatives, I have been asked to extend to you an invitation to attend this meeting also, should you find it convenient.

Sincerely,

FREDERICK H. WILLIAMS
Executive Director

FHW:os

THE BOARD OF EDUCATION
OF THE CITY SCHOOL DISTRICT OF NEW YORK
OFFICE OF PERSONNEL
65 COURT STREET
BROOKLYN, N.Y. 11201

FREDERICK H. WILLIAMS
EXECUTIVE DIRECTOR

187a January 5, 1973

Dear

As you know, the operation of New York City's formal supervisory examination system has been suspended since Federal Judge Walter Mansfield granted plaintiff's motion for a preliminary injunction more than one year ago in the case of Chance v. Board of Examiners. Since then supervisors have been assigned on an acting basis by community school boards or by the Chancellor for positions under citywide jurisdiction in accordance with procedures established by the City Board of Education and the Chancellor. Looking to the future however, a more permanent restructuring of the selection process seems necessary. To that end, the parties to the Chance case have been attempting to negotiate a mutually agreeable settlement of that law suit which would also provide the New York City School System with a more effective selection process.

The mechanism for considering new models and for determining which is most promising is a Task Force established by the parties with five representatives of the plaintiffs and five of the defendants. At the first of several meetings already held, the Task Force agreed that its broad function would be to consider simultaneously

1. A model for the best possible process for the selection of supervisors in the New York City School System, whether or not such a system required changes in existing statutes or regulations, and

2. A model for the most effective selection process within the parameters of existing law.

EXHIBIT A

From the start, the Task Force recognized that it could function effectively only if it received continuous inputs from community boards and others with a direct stake in the education of New York City's children. The time has come when those inputs are necessary. Moreover, the Task Force has reached tentative agreement on certain broad elements of a possible new selection procedure and has identified certain crucial questions with respect to which your reaction would be greatly valued. These are listed below.

We very much hope that you or your designee will be able to meet with the Task Force to give us your reactions and ideas. A meeting has been scheduled for Thursday, January 18, 1973, at 7 P.M. at the High School of Art & Design (57th Street at 2nd Avenue).

Please advise us as soon as possible if you or your representative plan to attend. You should respond directly to Mr. Frederick M. Williams, Executive Director of Personnel of the Board of Education, (telephone no. 596-6121, 65 Court Street, Brooklyn, New York).

Among the points of tentative agreement so far are:

1. The Board of Examiners will function as a service agency for the 31 community boards and the City Board of Education.

2. Duties of positions for all supervisory jobs will be created by the employing Board of Education whether it be the City Board or community board.

3. Elements of assessment based on such "duties of positions" which are common to all school districts will be jointly arrived at by the community boards, the City Board, Chancellor and the Board of Examiners, and the Board of Examiners will use these as a basis for assessment of all candidates.

4. School districts have unique requirements and will therefore generate elements specific to those districts.

5. The Board of Examiners accepts responsibility for assessing candidates on special elements identified by any community board or appropriate central authority if there is a request for such service but there will be no obligation to use the Board of Examiners to assess these special elements.

6. On the basis of its assessment of the common elements and of whatever special elements it is requested to assess, the Board of Examiners will construct for each candidate a profile which will be made available to the community board or the Chancellor or City Board.

7. The Board of Examiners will attest to the eligibility of all candidates on the basis of health, experience, and academic preparation (as determined by statute or by the City Board or Chancellor's policy).

We invite your comments on all of these points of tentative agreement.

In addition, many other matters are under consideration. For example, we would like your advice on the question of whether the examinations conducted by the Board of Examiners should result in disqualifying any eligible candidate or should merely provide information for the school board or Chancellor. We also ask you to think about which is preferable- - - the present system of eligibility lists which continue for a fixed period of time or examinations given on a regular, on-going basis, with eligible candidates continually added to lists.

We look forward to hearing from you.

The above is presented in behalf of the

Members of the Task Force for the Development of a New Supervisory Selection System.

Sincerely,

Frederick H. Williams

FREDERICK H. WILLIAMS
Executive Director

FHW:GB:g

30 East 39 Street
New York, New York 10016
February 8, 1973

Mr. Leonard Bernikow
Corporation Counsel
Municipal Building
New York, New York

RE: Chance, et al. v. Board of Examiners, et al.

Dear Len:

Pursuant to your request, I am enclosing a copy of the draft stipulation and order which we are submitting this date to the Board of Examiners for its consideration. These documents do not represent any final agreement between plaintiffs and the Board, but simply the latest exchange in our continuing negotiations.

Sincerely,

Elizabeth B. DuBois

EBDB:MR
encls.

cc: Saul Z. Cohen

Exhibit 6 - Letter dated April 2, 1973 from Leonard Bernikow to Judge Mansfield.
(Printed at pp. 156a-159a)

EXHIBIT 5

Affidavit of Leonard Bernikow,
sworn to May 3, 1973

LIBRARIES

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

- x

BOSTON M. CHANCE,
LOUIS C. MERCADO, et al., AFFIDAVIT

Plaintiffs,

v.

THE BOARD OF EXAMINERS AND THE
BOARD OF EDUCATION OF THE CITY
OF NEW YORK, et al.

Defendants

- x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

LEONARD BERNIKOW, being duly sworn, deposes and says:

1. I am an Assistant to NORMAN REDLICH, Corporation Counsel, attorney for the defendant, Board of Education of the City of New York, Harvey B. Scribner, Chancellor of the City School District of the City of New York, and Frederick H. Williams, etc., in the above-entitled matter. This affidavit is submitted in opposition to plaintiffs' motion for a default judgment. For the reasons set forth hereinafter, the above named defendants request that the motion for a default judgment be denied, and that said defendants be granted an opportunity to file their answer.

2. The instant motion, it appears, is being made as a response to the letter of your deponent to this court, dated April 2, 1973, in which your deponent outlined

the opposition of the defendant Board of Education, to a proposed stipulation, submitted to this Court and agreed upon by counsel for the plaintiffs and counsel for the Board of Examiners. During the pendency of this litigation when the Board of Education's position was not adverse to that of the plaintiffs, the plaintiffs were apparently content, and perhaps even anxious, to have the Board of Education remain a party. Since this litigation was commenced in September of 1970, counsel for the respective parties have had numerous contacts in the form of telephone calls, letters, discussions, meetings, etc. At no time, according to your deponents best recollection, did counsel for the plaintiffs ever request of your deponent that an answer be served.

3. Only now when the Board of Education acting in furtherance of its public duties under the Education Law of the State of New York noted a potential conflict between the proposed stipulation and the Constitution of the State of New York was this motion made. Plaintiffs made this motion for a default Judgment without giving any advance notice whatever to your deponent despite extensive contacts with counsel for the plaintiff nor any prior requests that an answer be filed. We recognize that there is no requirement of advance notice, nevertheless in view of the extensive contacts between counsel, the present posture of the lawsuit and the courtesy and cooperation extended to plaintiffs counsel by your deponent in this litigation, your deponent would have expected at least some word prior to the making of present type of motion.

4. More importantly, plaintiffs have never indicated that the failure of the defendants to serve an answer has in any way impeded their prosecution of this case or prejudiced them. Quite the contrary, it has been the position of all the parties that this case should not be tried and it should be settled. This remains the position of the above named defendants and I am informed it remains the position of the defendant, Board of Examiners. Admittedly, extensive settlement negotiations have been carried on thus far.

5. If plaintiffs are anxious to proceed to trial or if they determine that the lack of an answer would impede this case, then your deponent will submit an answer forthwith. However, the plaintiffs were apprised of the Board of Education's position, i. e., that the complaint presented triable issues, at an early state of this litigation. It is respectfully submitted that in view of the present status of the lawsuit there is absolutely no prejudice accruing to the plaintiffs because an answer has not been served.

6. The gist of the plaintiff's motion appears to be that because the Board of Education did not take an active role in this litigation they should be precluded from voicing any objection to the proposed stipulation. It is interesting to observe that the Chancellor, like the Board of Education, has not filed an answer and has not participated to any greater extent than the Board. Nonetheless, the plaintiffs would be willing to withdraw their

motion as to him so that he might join in the stipulation since he has asked the court to act favorably on the stipulation. (See plaintiffs Memorandum pp. 1-2).

7. Your deponent disagrees with plaintiffs that the Board of Education has not been active in this litigation. In fact, the Board of Education has always been vitally concerned and interested in this litigation. Their role, though admittedly not as active as plaintiffs and the defendant Board of Examiners, was dictated by their position noted above, regarding the merits of this lawsuit as articulated in the affidavit of Murray Bergtraum, dated October 27, 1970, the respective statutory duties of the Board of Education and Board of Examiners and indeed by the nature of the relief demanded in the complaint.

8. Despite the position of the Board of Education regarding the complaint, it contributed to and was an active party in this case. In the incipient states of this litigation when it was necessary to compile ethnic statistics, the Board of Education participated fully in that endeavor despite considerable time, effort and expense. The survey, which was conducted to determine the pass-fail ratios of different ethnic groups over the past few years, took several months to complete and covered 50 supervisory examinations. The completion of the survey took the Board of Education over 2000 man hours. The Board of Examiners also participated in this survey. The type of work that the survey involved is contained in a memorandum annexed hereto as Exhibit A.

9. The Board of Education also agreed to pay

half the cost of a survey which was conducted by NORC (National Opinion Research Center). NORC, an independent data-collection organization, was appointed by court order to conduct a survey to help describe the ethnic composition of the group of persons who passed, did not pass, did not appear, or withdrew from the supervisory examinations in question. The survey, which was a mail survey, was primarily concerned with those candidates no long in the New York City School System and those within the system whose ethnicity had not been ascertained.

10. With regard to the assertion, in the moving affidavit, to the effect that the Board of Education did not respond to the Request for Documents, it is my understanding that those documents requested, to the extent that they were available, were supplied by the Board of Examiners. In any event, plaintiffs counsel never indicated to your deponent that she was not satisfied with documents supplied to here or that she failed to receive certain documents which the Board of Education could supply.

11. With regard to the August 1, 1972, letter from plaintiffs' counsel requesting a meeting with the Board of Education, referred to in paragraph 13 of the moving affidavit, the Court is respectfully referred to the affidavit of Cary Sousa submitted herewith.

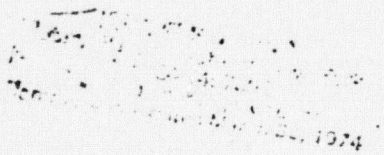
12. The assumption made in paragraph 13 of the moving affidavit is not valid. It is indicated there that the Board of Education was represented by one of their number, defendant Frederick Williams at the Task Force meeting. As is indicated in said affidavit, Mr. Williams

was the designee of the Chancellor to the Board of Examiners. I am informed that Mr. Williams sat for and reported to the Chancellor and not to the Board of Education and that the only communication received by the Board of Education this year (1973) from Mr. Williams relative to this issue was the letter of January 11, 1973, from Mr. Williams to Mr. Monserratt which is referred to in paragraph 19 of the moving affidavit inviting the Board to an open meeting on January 18, with the members of the Task force and others. The Board of Education considered that it was not appropriate to attend that type of open meeting in the first instance.

13. Attorneys from this office, particularly our deponent has made numerous court appearances representing the Board of Education during the pendency of this case. As mentioned earlier there has been extensive contacts between counsel in the lawsuit. Certainly as late as the submission to this court of the proposed stipulation of settlement, the plaintiffs considered the Board of Education a party since they provided for the signature of the Board of Education as its attorney at the foot of the stipulation.

14. Consequently, the motion for a default judgment should be denied since its purpose, it is submitted, is to pressure the Board of Education to agree to a stipulation of settlement that is needlessly violative of state law and policy in that a proper resolution of the merits of this suit need not be effected in such a manner as proposed by plaintiffs.

Sworn to before me
this 3rd day of May, 1973



LEONARD BERNIKOW

Opinion of Judge Mansfield
dated May 21, 1973

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- -x

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs,

-against-

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

- -x

FILED
U.S. DISTRICT COURT
S.D. OF N.Y.
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W.B.M.
#39488

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Leonard Sarnikow, Assistant to
Corporation Counsel, of counsel.

MANSFIELD, C.J.

Following affirmance by the Court of Appeals, 458 F.2d 1167, of our decision granting preliminary injunctive relief, we held a further hearing for the purpose of considering (1) a motion by the Board of Examiners for modification of the preliminary injunction to permit establishment of new examination procedures; (2) a pending motion by plaintiffs to permit the action to be maintained as a class suit pursuant to Rule 23(a), 23(b)(1) and (2), and 23(c)(1), F.R.Civ.P.; and (3) further proceedings looking to trial of plaintiffs' application for permanent relief. At the hearing counsel advised that plaintiffs and the Board of Examiners were willing to make reasonable efforts, in lieu of a trial on the merits, to develop a mutually acceptable examination system that would resolve the issues raised by the suit and substantially meet the constitutional objections forming the basis for our grant of preliminary relief. Accordingly, in view of the complexities of the subject matter, and the enormity of the task of devising a series of tests that would

meet constitutional requirements, we postponed further proceedings pending discussions between the parties.

Because of the numerous problems faced in developing an acceptable plan, the parties were required to meet almost weekly throughout the fall of 1972 and the winter of 1972-73. The active work was carried out by representatives of plaintiffs and of the Board of Examiners. Although the Board of Education was invited to attend, it took a neutral stance, as it had from the outset of the litigation. The efforts to resolve the issues were accordingly carried out by counsel for plaintiffs and the Board of Examiners, with the latter establishing a Task Force which considered the issues, developed models of a new examination system, and met with various interested groups.

Pending development of an acceptable examination system, the Board of Education adopted Special Circular 30, 1972-73 (Regulations Governing The Assignment of Acting Supervisors) as an interim selection procedure. Under that procedure most supervisory positions have been filled by acting rather than regularly licensed personnel. This procedure has given rise to financial and morale problems since acting personnel, a disproportionately high percentage of whom are Black and Puerto Rican, perform the same functions

as regularly appointed supervisors but neither receives the same financial benefits nor enjoy the prestige and authority that go with permanence.

On April 2, 1973, counsel for plaintiffs and the Board of Examiners submitted to this court a proposed Stipulation of Settlement, which represents the fruits of their long and arduous labors. It provides for a more comprehensive procedure for selection of school supervisors pending development of an adequate new examination system, which will require a substantial further period of time. Under the proposed new interim procedure the Community School Boards and Central Units within the decentralized system, although following a selection process of the type prescribed by Circular 30, would be authorized to make regular appointments where certain criteria are met rather than be limited to making acting assignments. It is anticipated that such a procedure would alleviate some of the problems inherent in Circular 30 by providing a greater degree of permanence and stability in current appointments.

Although it has adopted a relatively passive role throughout this litigation, leaving to plaintiffs and to the Board of Examiners the basic problems and the solutions, the Board of Education opposes the Stipulation of Settlement on two

grounds: (1) that since the stipulation's new interim procedure is not subject to a fixed termination date, it might continue in effect indefinitely and thus preclude a final disposition of the litigation by adoption of an acceptable permanent examination procedure meeting constitutional requirements, and (2) that the stipulation appears to contravene a state requirement that appointments in the public service be based on "merit and fitness." The Board of Education urges either that Circular 30 continue in effect or that the proposed new interim procedure be limited to a fixed period of up to six months. Plaintiffs have countered with a motion pursuant to Rule 55, F.R.Civ.P., for a default judgment against all defendants who have failed to answer, including the Board of Education, its members and the Deputy Superintendent of Schools.

After reviewing the stipulation we are satisfied that it represents not only an improvement over present interim procedures but a salutary step toward final resolution of this controversy. By providing for regular appointments during this interim period the stipulation would produce greater stability and confidence on the part of the supervisory staff than the present interim system which is limited to acting assignments. Like its predecessor, Circular 30, the

proposed new procedure appears to be based on the principle of merit and fitness, with emphasis on eligibility standards, parent involvement in the selection process, interviews, evalpation of on-the-job performance, and development of and adherence to other selection criteria. New York's Constitution does not rigidly mandate competitive examinations as the exclusive method of selection. It provides that merit and fitness shall be ascertained by such methods "as far as practicable." Indeed, except for Buffalo and New York City the State's constitutional requirement is satisfied elsewhere by a system of certification based on the candidate's academic training and professional experience without resort to competitive examinations.

The ideal solution would be the immediate establishment of a new permanent appointment system. But like ancient Rome such a system, which requires a careful study and analysis of numerous complex factors bearing on job-relatedness, fairness and evaluation of performance, cannot be built in a period of days or even of weeks. However, although we are prepared to accept and adopt the stipulation, we are persuaded that the parties should be stimulated to bend even greater efforts toward formulation of a final plan for a new permanent system within six months. Accordingly, after hearing the parties on May 10, 1973, with respect to the motions pending before us

we dispose of the motions as follows:

(1) Finding that all of the conditions precedent prescribed by Rule 23(a) for maintenance of the action as a class suit are met, we grant plaintiffs' motion pursuant to Rule 23(b)(2) for an order allowing it to be so maintained. The class shall include all Blacks and persons of Puerto Rican origin or descent who (1) have failed examinations for supervisory positions in the New York City School System; or (2) have failed to apply for or take such supervisory examinations because they reasonably believed the supervisory examination system to be discriminatory and unrelated to job performance; or (3) have taken such supervisory examinations and have been or are in the process of being evaluated for eligibility lists to be promulgated; or (4) are eligible or will be eligible for supervisory examinations to be given in the future.

(2) The Stipulation of Settlement between plaintiffs and the Board of Examiners, dated March 8, 1973, is approved on condition (a) that the following shall be inserted as Paragraph II, Section I, thereof, page 10:

> "I. Within six (6) months of the effective date of the judgment entered pursuant to Paragraph IV hereof, the parties shall either agree upon a plan for a permanent system for the selection of supervisors within the New York City School System, or any party shall be free to apply to the Court for modification of the judgment."

and (b) that Paragraph II, Section I, of the Stipulation shall be changed to Paragraph II, Section J, with the addition of the following prefatory phrase:

"J. Notwithstanding Paragraph II, Section I, above, any party may...."

The Board of Examiners having consented thereto, and there being no just reason for delay, we direct that a judgment incorporating the terms of the stipulation as so modified shall, pursuant to Rule 54(b) and 65, F.R.Civ.P., be entered against it. See English v. Cunningham, 269 F.2d 517, 521 (D.C. Cir.), cert. denied, 361 U.S. 897, 905 (1959), rehearing denied, 361 U.S. 950 (1960); A. D. Juilliard & Co. v. Johnson, 166 F. Supp. 577, 585 (S.D.N.Y. 1957), affd., 259 F.2d 837 (2d Cir. 1958), cert. denied, 359 U.S. 942 (1959). In all other respects the complaint against the Board of Examiners is dismissed.

(3) The motions of plaintiffs for a default judgment against the Board of Education and other defendants who have not answered the complaint and of the Board of Examiners for modification of the preliminary injunction are denied, subject to the condition that the preliminary injunction which remains in force against such defendants, including the Board of Education, is modified to require such defendants, pending

final determination of the action as to them, to adhere to the terms of the order and judgment hereby entered against the Board of Examiners.

Settle order on notice.

Walter R. Mansfield, U.S.C.J.

Dated: May 21, 1973.

Order of Judge Mansfield, dated
June 12, 1973

LAW DEPARTMENT
CITY OF NEW YORK
'73 JUN 5 PM 3 46
FREE & CORPORATION COUNSEL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

BOSTON M. CHANCE, et al., :

Plaintiffs, :

-against- :

THE BOARD OF EXAMINERS, et al., :

- X

73 Civ. 41

ORDER

Plaintiffs having moved pursuant to Rule 23 of the Federal Rules of Civil Procedure for an order allowing this action to be maintained as a class action, and plaintiffs, defendant Board of Examiners and defendant Scribner, Chancellor of the City School District of the City of New York, having entered into a Stipulation of Settlement of this action dated as of March 6, 1973, and having filed that Stipulation, together with a Motion for Approval thereof, with this Court, subject to the provisions of Rule 23 of the Federal Rules of Civil Procedure, and the Motion for Maintenance of the Action as a Class Suit, together with the Stipulation of Settlement and Motion for Approval thereof having been duly considered by the Court, and the Court having held hearings on May 9 and 10, 1973, and having rendered its decision dated and filed May 21, 1973, it is hereby ordered as follows:

I. It appearing to the Court that the Stipulation of Settlement, as modified in accordance with the Court's decision dated and filed May 21, 1973, has been entered into after arm's-length negotiations between plaintiffs and defendant Board of Examiners, and it appearing that the Stipulation, if finally approved, will be in the best interests of plaintiffs, and the members of plaintiffs' class described in paragraph II below, for whose benefit this action was instituted, and will produce greater

stability and confidence on the part of supervisory personnel in the New York City School System and will be a salutary step toward a new comprehensive examination system for the selection and appointment of supervisory personnel in the New York City School System, the Court hereby conditionally approves the Stipulation of Settlement.

II. All conditions precedent prescribed by Rule 23(a) of the Federal Rules of Civil Procedure having been met, the action is determined to be a class action maintainable under Rule 23(b)(2). The class shall consist of all blacks and persons of Puerto Rican or Latin American descent or origin who would have been or may become eligible for regular appointments to supervisory positions in the New York City School System but for their failure to possess the licenses which have in the past been issued on the basis of the supervisory examination procedures hitherto conducted by defendants.

III. A hearing shall be held before this Court on the 25th day of June, 1973, at 10 o'clock A.M. in courtroom No. 501, in the United States Courthouse, Foley Square, New York, New York for the purpose of determining whether the settlement of this action between plaintiffs, defendant Board of Examiners, and defendant Scribner, Chancellor of the City School District of the City of New York, pursuant to the terms and conditions of said Stipulation of Settlement is fair, adequate, in the best interests of the members of plaintiffs' class, and should be finally approved by the Court, and a final judgment entered pursuant to the terms and conditions of said Stipulation.

IV. Any member of plaintiffs' class shall be given an opportunity to be heard with regard to whether the settlement proposed by the Stipulation of Settlement shall be finally approved by the Court and to present any evidence at the hearing which may

be proper and relevant with regard to the fairness and adequacy of the settlement, and whether it is in the best interests of the members of plaintiffs' class, provided, however, that no person who is not a party to this action shall be heard and no papers, briefs, or evidence shall be received or considered by the Court from any such person (unless the Court shall in its discretion otherwise direct) unless a Notice of Intention to Appear and copies of any papers and briefs to be presented at the hearing shall have been filed with the Clerk of this Court and shall have been served on or before the ~~21st~~ 22nd day of June, 1973, upon Jack Greenberg at 10 Columbus Circle, New York, New York 10019, and upon Elizabeth B. DuBois, at 30 East 39th Street, New York, New York 10016, attorneys for plaintiffs, Kaye Scholer, Fierman, Hays & Handler, Esqs., attorneys for defendant Board of Examiners, 425 Park Avenue, New York, New York 10022, and The Corporation Counsel of the City of New York, attorneys for defendant Board of Education and certain other defendants, Municipal Building, New York, New York.

V. (a) Defendant Board of Examiners shall cause the notice attached hereto as Exhibit A to be published in the New York Times, New York Daily News, TWICE WEEKLY AND IN the Amsterdam News and El Diario ~~weekly~~ ONCE for two weeks commencing on or before the ~~13th~~ 13th day of June, 1973. The Court determines that the aforesaid procedure will give the best practicable notice under the circumstances to persons who may be members of plaintiffs' class.

(b) Counsel for defendant Board of Examiners shall file with this Court, as soon as practicable, one or more affidavits of service setting forth the date, issue and page of the Notice published in the publications specified in paragraph V(a).

VI. The hearing may be adjourned from time to time without further notice to members of plaintiffs' class other than by announcement at said hearing of any adjournment thereof. The Court also reserves the right to approve the Stipulation of Settlement with or without modifications without further notice.

Dated: New York, New York
June 12, 1973

S/ WALTER R MANSFIELD
U.S.C.J.

Transcript of Hearing before Judge
Mansfield, dated June 28, 1973

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE and LOUIS C. MERCADO, individually and on behalf of all other similarly situated,

Plaintiffs,

vs. 70 Civ. 4141

THE BOARD OF EXAMINERS and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

BEFORE: HON. WALTER R. MANSFIELD

APPEARANCES:

ELIZABETH B. DUBOIS
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JEFFREY MINTZ, ESQ.
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HOWARD A. JACOBSON, ESQ.

NORMAN REDLICH, ESQ., Corporation Counsel
Attorneys for Defendant Board of Education
BY: LEONARD BERNIKOW, Assistant to
Corporation Counsel

(Continued)

ALSO PRESENT:

CHARLES WIENER (Pro Se)

FRANKLE & GREENWALD
Attorneys for Counsel of Supervisors and
Administrators, Local 1, SASOC, AFL-CIO
80 Eighth Ave.
New York, New York 10011
BY: LEONARD GREENWALD, ESQ., of Counsel

JEANNE R. SILVER
Attorney for Public Education Association (Amicus)
31 East 11th Street
New York, New York 10003

SEYMOUR CHAYS (Pro Se)
DAVID SEELEY, ESQ., Director of Public
Education Association

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* * *

[page 2]

THE COURT: For the record, let me state that this hearing is held pursuant to an order that was signed by me on June 12 directing that notice be given with respect to a proposed settlement of the action between the plaintiffs and the Board of Examiners and the defendant Scribner, the Chancellor of the City School District of the City of New York.

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What we are trying to do in the light of the decision by the Court is to find a way of developing an examination procedure that will not be discriminatory and will be job related.

* * *

[pages 44-45]

MISS SILVER: Your Honor, the Public Education Association, which has appeared previously in this case as amicus -- Mr. Sedley, the director of the association is also here sitting next to me.

The Public Education Association has appeared in support of the settlement, not because it originally felt there should be any need to appear in support of the settlement, but because it was learned that opposition was being levied from other organizations and people who were not parties to the settlement negotiations. I don't think we need to belabor the reasons for supporting this settlement. I think they are adequately set forth in Your Honor's opinion of September 21,

The Public Education Association agrees with Your Honor on the necessity for regularizing some of the appointment procedures and permitting permanent appointments to occur during this interim period pending a final settlement in the event that the school boards and central appointing authorities want to make permanent appointments.

* * *

[page 46]

On the substance of the objections that have been made here, it is clear to us that the stipulation itself has not been read and that many of the things that are being said are mischaracterizations in terms of the stipulation. It is being overlooked that this is a settlement agreement and in the course of this settlement agreement the parties on both sides are giving up rights. Preliminary injunctions

had been issued which barred the use of those examinations as a qualification for a license.

The terms of that preliminary injunction would be relaxed by the settlement agreement and people who have passed examinations would be allowed to advance that passage of examinations as a basis for receiving a license and it would afford them the opportunity to be licensed, and they would have equal opportunity for appointment with the acting personnel who qualify under the new system.

There is simply no priority being given to anybody by the terms of this agreement.

* * *

[page 49]

The suggestion that community school boards are acquiring appointment rights under this settlement agreement that they do not have as a matter of law is completely erroneous. Your own opinion granting the preliminary injunction recognized the rights of community school boards to appoint personnel under the decentralization. Those rights still exist.

In fact, under the settlement agreement, the licensing and qualifying of personnel is a joint function

of the Board of Examiners and community school boards.

It is a mistake to suggest that special Circular 30, as previously adopted by the Board of Education for better or worse, is mandated to continue under the settlement stipulation. The stipulation states in its express terms that either that circular or such modified versions as may be promulgated by the Board in the future shall continue.

The Public Education Association feels very strongly that the application of procedures like those set forth in special Circular 30 and referred to in your May 21 opinion is crucial and that such procedures should apply in the selection among all the eligible people for permanent appointments. We can't see what the objection is to the references to that circular in the opinion.

I don't believe that we see any further comments that need to come from us. I would like to reiterate again that we do endorse a settlement as a settlement, not as a perfect document, but as a very acceptable and desirable interim solution in this case.

* * *

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MRS. DUBOIS: My name is Elizabeth DuBois, representing plaintiffs.

Your Honor, I would like to discuss separately the issues relating to the question of whether this Court should finally approve the settlement pursuant to 23-E and the question of intervention that have been raised for the first time here.

* * *

[page 55]

As a preliminary matter, I would also like to stress the fact that the settlement, we get into details about certain aspects of the settlement which some persons and organizations like and don't like. The settlement represents

a clear compromise on the part of plaintiffs and something worked out over a year in which different details have been bargained back and forth. I think at this point the question before the Court is whether the settlement as a whole is to be approved or whether the settlement is scrapped and we go back to the acting system and Circular No. 80. I think there is no way that it would be fair to any of the parties, and certainly plaintiffs in this case, to tamper with details of the settlement.

* * *

[page 57]

Without modification, I submit under 23-E the settlement should be approved. That there have been no issues here except issues that might be relevant to intervention, but no issues here raised which in any way indicate that the settlement isn't in the best interests of the plaintiffs' class.

I think that since -- well, to briefly summarize, although it was dealt with, really, in the proceedings leading up to the Court's May 21 opinion, but to briefly summarize why the settlement appears to us to be in the best interests

of the plaintiffs' class and the school system, it would correct inequities suffered by the present acting personnel in the school system, as the Court pointed out in its opinion.

These people now have less pay, less status, and less stability in their position than licensed personnel.

The CSA, this is the one thing the CSA has raised here that conceivably goes to whether the settlement is fair from the point of view of the plaintiffs. They argue that as far as acting personnel are concerned, the settlement creates second-place status for them.

I think it is clear that one of the major purposes of the settlement was to eliminate the present second-class status and it has done that by providing that after five months of an acting person, acting people can be licensed and can be like every other licensed person in the system.

It is true for that five months they may have a different status. However, it is clearly an enormous advance of their interests over what they are now living with, which is a situation of after three years they are acting, they still have this second-class status.

I think the remedy that the CSA proposes for the second-class status is to cut off the rights of new qualified people to become eligible as acting, so I think it is clear that there is nothing that the CSA is really arguing that

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would in any way benefit members of plaintiffs' class.

The settlement would also provide an equal opportunity for appointment to all non-licensed but qualified candidates.

* * *

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I will talk about the questions of the integrity of the process by which the settlement was arrived at, or the integrity of the Board of Examiners.

The CSA and others say that because of the change in the composition of the Board of Examiners, the validity of the settlement is somehow suspect. I think it is important to make it clear that there is nothing improper about the way in which the settlement was arrived at or suspect about the

results of that process.

The Board of Examiners was the only Board of Examiners that plaintiffs have had to deal with in the past year, and was a legitimate board. The change in the membership of the Board of Examiners and this provisional status of two of its members cannot mean the Board of Examiners is not empowered to function during this past year. It clearly had the right to settle the case as much as it had the right to defend the case, and as much as it had the right to run an examination system for the city schools.

It was appointed, or its two members were appointed, in accordance with law and regular procedures. They were, in fact, appointed by the Board of Education opposing this settlement.

I would also like to point out that this kind of change is not unique to the Board of Examiners. It is endemic in this educational system, as we have seen in the last couple of years. The Board of Education that we have been dealing with is interim and has been from the beginning of this lawsuit. It has been living on a year-to-year basis and legislation has just been passed to put this Board of Education out of commission one year from now.

The Board of Education has also changed composition since the beginning of this lawsuit, and we have been dealing

at different times with a different sort of animal.

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The old Board of Examiners lasted only one year from the date we brought the lawsuit and no one raised any argument that because three of its members were old and on the way to retirement we couldn't deal with that board or it couldn't defend the lawsuit.

I think that this charge of collusion or lack of adverse interest between the parties --

THE COURT: I don't think you have to spend much time on that. I have witnessed enough of this to recognize that there is no such thing.

I do have this question in my mind: The concept of competitive examinations, which has been in existence for many years, of course assumed that the eligible lists of eligibles would be the sole source for appointments, and that is the way it worked.

Now, we have an interim proposed system where, pending the development of a new examination system, you are in effect trying to remedy some of the unfortunate consequences of the earlier system by adopting what might be described as a kind of hybrid, as I see it. It is an interim hybrid, however.

Now, the question, of course, that has concerned me, and I think I mentioned something about this in my

tentative opinion indicating approval, as how long will this [illegible] continue in effect, because, of course, it does create these problems that are raised about the interaction of the acting versus the earlier certified listed eligible licensees, and in many districts community school boards, I have no doubt that there will be selections tending to favor the acting personnel who otherwise satisfy all of these conditions precedent as against the ones that have passed examinations and followed the traditional route.

Now, I think that puts a premium, as I think I said from the outset, on the necessity for making sure that it does remain only an interim system and that all speed be developed toward the promulgation of a final examination system that will satisfy the requirements that we specified in the original decision.

Now, the question is, we put in some language about six months, I think it was, in Paragraph I, and left open the possibility of applying to the Court for modification.

What do you think of the six-month period? Is this going to be realistic?

MRS. DUBOIS: I think that it is realistic to expect a plan. I don't think that it is realistic to expect a fully formed system, which will be ready to examine for every position in the school system.

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I said I think it is realistic to expect a plan, but not a fully formed examination system.

I don't think that there is anything more that the Court can realistically do or should do, I guess, to speed up the process, because a system can't be formed until the Board of Examiners agrees upon one and develops it. I think that it is in its interests and the Board of Education's interests to do that, and there are certainly lots of factions in the school system that are pushing them to do that.

I think we have certainly put in a lot of time and are willing to continue to do that to try to work it out so that at the end it isn't something that we just want to come in and challenge and delay.

It seems to me that one of the things that is good about this settlement is at least it brings us out of some of the problems of the present acting system and is a workable interim system where people aren't being unfairly treated.

I think that problems that might arise, and it is really hard to tell what might arise in this choice of how local boards will make the choice on the lists and people who aren't on the lists, and are problems that can be dealt with by the Board of Education just as it dealt with the preliminary injunction, Circular No. 30. It seems to me it

has the power and it is possible for this Court now to try to predict these problems and try to resolve them, it is proper for the Board of Education to -- I think the six months is the best that can be done.

THE COURT: All right.

* * *

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MR. COHEN: I have really one or two brief comments I would like to make.

One is to again reiterate at the risk of being repetitious, but I think it is important that it be said on the record by me that this is a settlement. It is not the result -- there is not going to be any victory dinner in any camp as a result of resolving these very difficult problems in this matter.

As counsel for the Board of Examiners and for each of the members of the Board of Examiners, no one has any illusions that this represents a perfect resolution of the problem, but considering it as an alternative to a lengthy litigation in which the probability of success was in doubt,

this would have been an incredibly time-consuming experience which would have been disruptive, in our judgment, to the stability of the school system. We felt that working out the problems in the manner 230a that is set forth in the stipulation was a preferable alternative.

Furthermore, we felt that it does do substantial justice to the competing claims in that it gives immediate recognition to the licenses that were enjoined and which would have stayed enjoined through the pendency of a litigation.

It does put -- it provides for a meaningful way in which to license the actings, even though it is not a way that necessarily corresponds with a more highly developed way, but it is one that can be used as an interim system.

The complaints about failure of people who are on lists to be able to get jobs as against the actings is not necessarily -- I want to emphasize this -- not necessarily a result of this stipulation. Many of the people, it is not correct to assume -- let me put it this way -- that the people who are in acting positions would not have been on lists, which is a premise which is contained in the statements of Mr. Wiener and Mr. Chays.

As a matter of fact, we found, this information has not been released, but I think we have already conveyed it

231a

Your Honor, that in connection with the elementary school principals list, 75 percent of the acting, who are serving in elementary schools, 75 percent of those actings in the elementary school principal jobs, passed the examination which was the subject of the original litigation and, therefore, will appear on the lists that will be promulgated. So to start from the premises that these entire group of actings are a group of incompetents and would never have appeared on the lists is a false premise.

Taking into account all these considerations and looking down the road at what we were facing as an alternative, I think it was a reasonable conclusion on the part of the Board of Examiners to enter into this settlement. We certainly don't believe that everyone gets everything he wants out of this thing. The plaintiffs didn't, nor did the Board of Examiners. They would have been happier to see other differences, but on balance, we feel it does substantial justice and is an appropriate settlement and protects the rights of all.

I wanted to make two other comments dealing with points that have been made.

One is, I would like to get to test the question of the power of the provisional examiners. I am not going to comment on the question of whether there is an adequate

representation, but there are provisional examiners appointed pursuant to Section 65 of the Civil Service law. They have
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the power to function as board members. They function as board members, they entered into the negotiations and I think their power to have concluded this settlement is beyond question.

The question of attitude of the Board of Examiners from the beginning of the case [illegible] end of the case, there can be changes in attitudes on the parts of parties to litigations, as I am sure Your Honor will understand, in any litigation, even if it is the same party, and certainly the political process under which the Board of Examiners is constituted contemplates that there is going to be changes in membership and when those changes occur, it contemplates that the changes in attitudes reflected by the new members will be a part of this process. So that if there have been changes in attitudes of the Board of Examiners, I think that is part of the process under which we are operating.

Your Honor does point up a problem which will have to be dealt with, and I say this not because I want to complicate our life in connection with this stipulation, but I would like to have the record indicate that at such point as the parties either have agreed on a new examination procedure or a party present one and we arrive at a

resolution of the new examination system, that question of how you terminate and what happens to the acting status, and how that is meshed with the lists that are in existence, will have to be dealt with and we are aware that that is a gap that exists because this stipulation essentially deals with resolving the past and leaving to the parties an effort to resolve the future.

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Finally, I wanted to point out that the question of indefiniteness has been raised, and while we have no objection to making this procedure as definite as possible, there is certain control in that the parties can bring to the Court on three weeks' notice a plan, so it is within the power of the Board of Education, the Board of Examiners, if agreement could be reached on an appropriate plan, to conclude these deliberations by bringing to the Court a plan.

On the other hand, I also recognize some of the difficulties in getting to that position, and I would say that we are not adverse to having the pressure of possible reappearance before Your Honor to be used as an inducement to facilitate the development of a plan.

It might be the grease that is necessary to move this project along.

THE COURT: As I recall it, it provides that within six months you have to either agree on a permanent system or

plan for the selection of supervisors, or else any party --

MR. COHEN: May.

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THE COURT: May, all right, apply for a modification.

Now, it may be that it will have to be done in stages. I have no idea.

As Miss DuBois points out, you may have a plan and then you have the problem of the examinations being actually prepared and implementation of that plan. I don't know. I am not that familiar with it. I have some worries and I think they are shared by yourselves as to its being an interim that turns out to be like temporary duty in World War II, or something, and you end up finding the interim isn't quite as temporary as you thought it was going to be. That is what worries me.

Mr. Bernikow?

MR. BERNIKOW: Your Honor, I would like to clarify something that Mr. Cohen said. He said that 75 percent of those acting people that have been appointed came from lists which were enjoined. I would just like to clarify something.

It is my understanding that 75 percent came from only one list, the elementary school principals.

MR. COHEN: I thought I made that clear that I was referring to the elementary school principal list.

THE COURT: Of course that is one of the most important lists.

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MR. BERNIKOW: That is true. Your Honor is familiar with the position of the Board of Education. If you will, I would just like to briefly restate it for the record.

Firstly, Your Honor has indicated in one of your remarks to one of the applications of the intervenors that this settlement is meant to be an interim document.

Your Honor, I respectfully submit, as Your Honor has just pointed out in your remarks to Mr. Cohen, that the interim settlement could be a permanent settlement in that we feel that this settlement could go on for an inordinate period of time.

As Your Honor quite correctly pointed out, within six months the parties shall agree upon a new examination procedure. However, in that same paragraph in Your Honor's opinion of May 21, it is pointed out that any party shall be free to apply to the Court for modification of the judgment. That is in alternative terms of the six months.

I urge the Court to adopt a firm date so that this plan, this settlement, would come to an end in six months rather than have any party free to come to the Court at that time and then there will be an additional six months or whatever time is needed by any of the parties to adopt

a new examination procedure.

This is one of the great fears of the Board of Education, who strongly opposes the settlement, because this interim procedure can be a permanent procedure.

Secondly, Your Honor, as against the position of the Board of Education that this settlement violates the constitutional provisions of the State of New York which provide that an appointment in public service shall be based upon merit and fitness to be ascertained as far as practical by examination, which as far as practical shall be competitive. Recently the Court of Appeals of the State of New York in the Timson case or the case cited as Board of Education of the City of New York v Nyquist, again reiterated the fact that examinations which determine merit and fitness are the only basis for tenure and license and that an acting position cannot ripen into any sort of permanent position.

* * *

[Transcript ends on page 87 with index]

Affidavit of Harold Siegal, sworn to
July 3, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

BOSTON M. CHANCE and LOUIS C. MERCADO, individually on behalf of all others similarly situated,

Plaintiffs

-against-

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK:
GERTRUDE E. UNSER, individually and in her capacity as Chairman of the Board of Examiners;
JAY E. GREENE, MURRAY ROCKAWITZ and PAUL DENN, individually and in their capacities as members of the Board of Examiners;
MURRY BERGTRAUM, individually and in his capacity as President of the Board of Education;
ISAIAH E. ROBINSON, JR., individually and in his capacity as Vice-President of the Board of Education;
MARY E. MEADE, SEYMOUR P. LACHMAN, and JOSEPH MONSERRAT, individually and in their capacities as members of the Board of Education;
HARVEY B. SCRIBNER, individually and in his capacity as Chancellor of the City School District of the City of New York; and THEODORE H. LANG, individually and in his capacity as Deputy Superintendent of Schools of the City of New York.

Defendants.

- -X

Civil Action
70 Civ. 4141

AFFIDAVIT

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

HAROLD SIEGEL, being duly sworn, deposes and says:

1. I am the Secretary of the Board of Education of the City School District of the City of New York.

2. This affidavit is submitted on behalf of the defendant Board of Education of the City of New York, hereinafter, the Board, to set forth its opposition to the proposed Stipulation of Settlement in the above captioned matter, which was submitted to this Court on or about April 2, 1973.

3. The Board of Education is opposed to the stipulation in its present form as a means of resolving this litigation. The Board's reasons are twofold:

a) The stipulation provides only an additional interim procedure in lieu of the present interim procedure, Circular No. 30.

b) The stipulation appears to violate basic State constitutional and statutory provisions which need not be violated or vitiated in any way even if the claims asserted in this litigation are correct.

4. In respect to the first reason for the Board's objection, the Court is respectfully referred to Schedule C annexed to the stipulation, Special Circular No. 30-1972-1973 entitled "Regulations Governing the Assignment of Acting Supervisor". This Circular and its procedure was issued to meet the need to appoint supervisory personnel during the pendency of this litigation after the previous procedures were temporarily enjoined. The Circular provides the means of selecting supervisory personnel for appointment to both Community and Central Boards. It does not have a fixed termination date, thus the procedures set forth therein are operative until this litigation is terminated.

5. The Circular resolved the serious problem of satisfying the need for qualified persons to be appointed as acting supervisors during the pendency of this suit. The proposed settlement merely offers an additional alternate "interim" solution. The stipulation in no way resolves the merits of this litigation in that there is no provision relating to what criteria and manner of testing for supervisors can be followed in the future. In the interest of an orderly administration of the New York City school system it is imperative that any settlement of this action promptly set forth the procedure to be followed that can be deemed consistent with federal con-

stitutional requirements. The lack of such specific hiring standards fosters confusion and divisiveness in the school system. And, the transition to a permanent procedure necessarily becomes more difficult the longer this interim procedure is allowed to continue. In addition, the proposed procedures could continue in operation for an inordinate period of time. Indeed, the present interim procedures have been in effect for a considerable period.

6. It is true that the Court in its memorandum dated May 21, 1973 directs that the following paragraph be inserted as Paragraph II, Section 1 of the Stipulation:

> "I. Within six (6) months of the effective date of the judgment entered pursuant to Paragraph IV hereof, the parties shall either agree upon a plan for a permanent system for the selection of supervisors within the New York City School System, or any party shall be free to apply to the Court for modification of the judgment."

However, it is respectfully submitted that, in fact, the said paragraph does not establish a firm date for the establishment of a permanent system for the selection of supervisors since any party can apply to the Court for a modification of the judgment. The Board of Education believes that the establishment of a firm date for a new permanent procedure is essential.

7. With regard to the second reason referred to in paragraph "3" of this affidavit, the stipulation appears to contravene a legitimate state policy i.e., that appointments in the public service be based on "merit and fitness". Recently the Court of Appeals of the State of New York reaffirmed the need for examinations which determine merit and fitness prior to an individual receiving tenure of license in the New York City School System. (Board of Education of the City

of New York v. Nyquist, 31 N Y 2d (1973). In that case Chief Judge Fuld looked to the instant litigation as a possible source for the emergence of new testing procedures for supervisory personnel. The Board of Education shares that hope and is willing to work towards such an objective consistent with federal constitutional standards.

It is clear that testing per se is not the claimed wrong herein but only that the nature of the tests heretofore given violated plaintiffs' rights. Thus there is no necessity to completely abandon all effort to devise a test that meets constitutional standards by which permanent appointments can be made in accordance with the state's policy of "merit and fitness". It has never been argued in this case by plaintiffs that adherence to "merit and fitness" principles of proper examinations would violate plaintiffs' 14th amendment rights.

8. In conclusion, the Board would find the proposed stipulation of settlement acceptable if those persons appointed acting supervisors prior to March 5, 1973 would come under the terms of the stipulation for permanent appointment and licensing in accordance with the procedures set forth in the stipulation. As to acting appointments made subsequent to that date, the normal "merit and fitness" procedures as required by State Law would be operative within the context of an examination procedure that meets all relevant federal constitutional criteria. A further proviso would be a more definite assurance that the construction of a constitutionally valid examination would be completed within

the six month period suggested by the court. The date of March 5 is proposed since it would cover 242a all those appointed to acting supervisory positions prior to the second semester of the 1972-73 school year in accordance with Circular 30.

In summary it is the position of the Board of Education that the stipulation does not bring this case any closer to the final resolution that the interests of the school system demand in terms of appropriate examination procedures.

Harold Siegel

Sworn to before me this
3rd day of July, 1973.

JULIUS KAPLAN
Commissioner of Deeds
City of New York 2-1760
Certificate filed in Kings County
Commission Expires May 1, 1975

Julius Kaplan

Opinion of Judge Mansfield, dated
July 10, 1973

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- -x

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs,

-against-

70 Civ. 4141
W.R.M.

THE BOARD OF EXAMINERS and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

- -x

A P P E A R A N C E S

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Norman Redlich, Esq.
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Leonard Bernikow, Assistant to Corporation
Counsel, of counsel.

MANSFIELD, C.J.:

Pursuant to our order dated June 12, 1973, public notice having been given as provided therein, we held a hearing in accordance with Rule 23(e), F.R.Civ.P., on June 28, 1973, for the purpose of determining whether the proposed settlement of this action between the plaintiff class and the defendants Board of Examiners and Harvey Scribner, which has been incorporated in a stipulation filed on May 21, 1973, should be finally approved. Tentative approval had been given by our opinion dated May 21, 1973.

At the hearing there appeared, in addition to counsel for the parties, Charles Wiener, pro se, Seymour Chays, pro se, Leonard Greenwald, representing the Council of Supervisors and Administrators of the City of New York ("CSA"), Local 1, SASOC, AFL-CIO, and Jeanne Silver for the Public Education Association.

Mr. Wiener, who has been a teacher in the New York City public school system for the last 19 years and has earned several teaching licenses through the examination system administered by the Board of Examiners, was heard in opposition and formally moved pursuant to Rule 24(a)(2), F.R.Civ.P., for leave to intervene in the action. Mr. Seymour Chays, who had passed examinations given by the Board of Examiners, was also

heard in opposition. Mr. Greenwald was heard in opposition and informally sought leave to intervene on behalf of CSA. Counsel for the plaintiff class and counsel for the Board of Examiners were heard in support of the application. Counsel for the Board of Education expressed opposition limited to the grounds already summarized in our May 21, 1973 opinion. No principal of the plaintiff class appeared in opposition to the proposed settlement. The parties were given until July 6, 1973 to file any further supporting or opposing papers.

In addition to papers previously filed by Messrs. Wiener, Greenwald and Chays in opposition to the proposed settlement, we have received and considered the affidavit of Harold Siegel, Esq., on behalf of the Board of Education, dated July 3, 1973, and the letter of Kenneth J. Bialkin, of the firm of Wilkie, Farr & Gallagher on behalf of the Anti-Defamation League of B'nai Brith.

The application of Mr. Wiener to intervene is denied as untimely. Although he learned of our decision in the summer of 1971, his first application to intervene, which was made to the Court of Appeals in February 1972, was denied. Following its disposition of the appeal in April 1972 he made no further application to this court until the present one. The applications of Mr. Wiener and the CSA to intervene are

denied for the further reason that the interests of the plaintiff class are adequately represented by the existing parties. A formal application by the CSA to intervene at an earlier date in these proceedings was denied on October 26, 1970, in a decision holding that the CSA, as collective bargaining agent for supervisory personnel in negotiations for salaries and other benefits, was not authorized to represent its members with respect to examinations for licenses and had no recognizable interest in the subject matter of the action. CSA's present status as collective bargaining representative of individuals who have been assigned to acting supervisory positions does not in our view give it any greater interest in the subject matter of the action.

After thorough consideration we are persuaded that the stipulation of settlement, which represents a hard-fought compromise between representatives of the plaintiff class and the Board of Examiners, should be approved as an interim procedure in the best interests of the plaintiff class and of the public school system as a whole. We share the hope expressed by the New York Court of Appeals in Board of Education of the City of New York v. Nyquist, ___ N.Y.2d ___, N.Y.L.J. Mar. 12, 1973, that a permanent examination procedure meeting constitutional requirements will be devised by the

parties. However, the parties advise that a substantial additional amount of time will be required for the development of such a system, since agreement must be reached as to an overall plan and the plan must then be implemented by adoption of specific examination procedures for numerous positions. In the meantime many persons have for long periods been serving as acting supervisory personnel and others who have passed some or all of the earlier examinations have been barred by our earlier injunction from consideration for permanent procedures. A further interim procedure is advisable to assure the public and candidates for permanent tenure, including acting personnel, that merit and fitness are currently being recognized and thus restore some degree of confidence in the system. As we stated in our May 21, 1973 decision the "proposed new procedure appears to be based on the principle of merit and fitness, with emphasis on eligibility standards, parent involvement in the selection process, interviews, evaluation of on-the-job performance, and development of and adherence to other selection criteria. New York's Constitution does not rigidly mandate competitive examinations as the exclusive method of selection. It provides that merit and fitness shall be ascertained by such methods 'as far as practicable.' Indeed, except for

Buffalo and New York City the State's constitutional requirement is satisfied elsewhere by a system of certification based on the candidate's academic training and professional experience without resort to competitive examinations."

We reiterate that our action is taken upon the representation of the parties that they will bend every reasonable effort toward formulation of a final plan for a new permanent system within six months. The stipulation of settlement is amended accordingly as provided at pages 7-8 of our May 21, 1973 decision to permit any party to apply to the court for modification of the judgment if a permanent plan is not adopted within the six-month period.

We understand that the supervisory eligibility lists to be released will include not only those for the 63 positions listed in Appendix A to the Stipulation of Settlement but also for the positions of Elementary School Assistant Principal and Junior High School Assistant Principal.

Submit order accordingly on or before Thursday, July 12, 1973.

Walter R. Mansfield, U.S.C.J.

Dated: July 10, 1973.

Final Judgment, and Order of Judge Mansfield
(with exhibits), dated July 12, 1973

N THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

- X

BOSTON H. CHANCE, LOUIS C. MERCADO, et al.,
Plaintiffs,

v.

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,
Defendants.

- X

70 Civ. 4141
(W.R.M.)

FINAL JUDGMENT AGAINST DEFENDANT BOARD OF EXAMINERS, ITS MEMBERS, AND DEFENDANT CHANCELLOR OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK

Plaintiffs, defendant Board of Examiners, its members, and defendant Chancellor of the City School District of the City of New York, having entered into a Stipulation of Settlement of this action, and having made a Motion for Approval thereof, and the Court having held hearings on May 3 and 10, 1973, having rendered its decision dated and filed May 21, 1973, notice of the proposed settlement having been given to the members of plaintiffs' class pursuant to this Court's order of June 12, 1973, and a hearing having been held June 28, 1973, at which all members of plaintiffs' class were given an opportunity to be heard with respect to whether said settlement is fair, adequate, in the best interests of plaintiffs and their class, and should be approved by the Court, and the Court having considered the Stipulation of Settlement and the arguments made and papers submitted in connection with said hearing, and having issued its opinion of July 10, 1973, the Court hereby finally approves the Stipulation of Settlement, now, accordingly,

the following; final judgment against defendant Board of Examiners, its members, and defendant Chancellor of the City School District of the City of New York shall be entered.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

I. A. Pursuant to the order of this Court dated June 12, 1973, this action is a class action maintainable under Rule 23(b)(2). The class consists of all blacks and persons of Puerto Rican or Latin American descent or origin who would have been or may become eligible for regular appointments to supervisory positions in the New York City School System but for their failure to posses the licenses which have in the past been issued on the basis of the supervisory examination procedures hitherto conducted by defendants B. The Stipulation of Settlement is hereby finally approved and adjudged to be fair, adequate and in the best interest of plaintiffs, and the members of plaintiffs' class.

II. Except as provided, permitted and authorized in paragraphs III through X, and XII inclusive hereof, defendant Board of Examiners, its members and defendant Chancellor of the City School District of the City of New York, their agents, servants, employees and attorneys, and all persons in active concert and participation with them, are permanently enjoined and restrained from:

A. Conducting further examinations for supervisory positions in the New York City School System;

B. Processing or grading or in any other way administering examinations for supervisory positions in the New

York City School System which have previously been administered;

and

C. Promulgating eligible lists or issuing licenses solely on the basis of examinations for supervisory positions in the New York City School System which have previously been administered.

III. Community School Boards within the New York City School System or the central Board of Education (hereinafter referred to as "appointing authorities"), are permitted and authorized to select and appoint supervisory personnel for positions within their respective jurisdictions from among the following persons subject to the provisions of paragraph VI, infra:

A. Persons whose names appear on Board of Examiners lists for the positions set forth on Exhibit A hereof, which lists have either been heretofore (1) promulgated or (2) completed but not promulgated or (3) prepared but not completed solely because the Board of Examiners has not completed the required check on eligibility requirements established by the Board of Education* provided, however, that persons on such lists are determined by the Board of Examiners to satisfy said eligiblity requirements.

B. Persons who have previously taken and passed a written examination for the supervisory positions under the jurisdiction of the central Board of Education which are set forth in Exhibit B hereof and who, subsequent to the entry of this Judgment, perform to the satisfaction of the Board of Examiners, certain additional job-related tasks.

* Except in the case of the District Supervising Attendance Offic list where training and experience of candidates must be rated.

C. Persons (1) who have been or will be appointed t a supervisory position in the New York City School System on an acting basis to fill a vacancy*, either in accordance with Special Circular No. 30 or in accordance with previously applicable procedures, or in accordance with procedures subsequently developed by the Chancellor or the Board of Education, and (2) who have completed or will complete at least 5 months' service in that position on an acting basis, and (3) who satisfy the eligibility requirements set forth in Part III (A)(1) of Special Circular No. 30 and the requirements of Section 236 of the By-laws of the Board of Education, as determined by the Board of Examiners. Such perso shall be licensed only after thei on-the-job performance in that position has been evaluated and examined by the Board of Examiners, in conjunction with the appointing authority and pursuant to criteria developed with the appointing authority, which shall be consistent with the mandate of Part III (B)(3) of Special Circular No. 30, provided, however, that pending implementation of a new selection system pursuant to Paragraph IX or X hereof, the appointing author is authorized, in its discretion, to continue the employment of any person who is not licensed pursuant to the aforesaid evaluatio and examination on an acting basis so long as the appointing authority considers it appropriate, and such person may apply for re-evaluation and re-examination hereunder provided, however, that there shall be at least a five-month interval between such applications. The evaluation and examination required by this Paragrap

* For purposes of this Judgment the term vacancy shall be defined as it is in Part I of Special Circular No. 30, 1972-1973 dated October 25, 1972, of the Chancellor of the Board of Education of the City of New York (a copy of which, hereinafter referred to as "Special Circular No. 30," is Exhibit C hereof).

III shall be completed within 60 days from the date the Board of Examiners receives the candidate's application.

IV. In the event a person is eligible for licensing under the terms of more than one sub-paragraph of Paragraph III, such person shall be permitted to apply for licensing under all such sub-paragraphs and shall be licensed if he qualifies under any one.

V. Applicants who satisfy the requirements of Paragra. III hereof shall be issued licenses for the particular position, if they are not already so licensed, and shall thereafter be entitled to all the rights, privileges and perquisites, and be subject to all the laws and regulations attendant thereto.

VI. No appointments shall be made, and no licenses reinstated or issued pursuant to Paragraphs III and V hereof until the Board of Examiners shall have:

A. Completed its evaluation and examination of th on-the-job performance of all acting supervisors who have submitte applications pursuant to Paragraph III(C) hereof within 30 days of the opening date of school in the fall of 1973, pursuant to appropriate application procedures which shall be developed by defendant Board of Examiners. Defendant Board of Education shal give appropriate notice to all acting supervisors of their rights to be considered for licensing and appointment pursuant to this Judgment and the modified Preliminary Injunction entered this date and of said application procedures, by the opening date of school in the fall of 1973. Defendant Board of Education shall also make provision for such notification on an ongoing basis to acting supervisors who become eligible subsequently for licensing and appointment pursuant to this Judgment and the modified Preliminary Injunction entered this date.

B. Submitted a report to the Court, with copies to plaintiffs' counsel, indicating separately with respect to persons

examined pursuant to Paragraph III (B) and (C) supra,

1. the number of examinations given;

2. the type of examinations given;

3. the number of applicants participating in each type of examination, their race/ethnicity (black, Puerto Rican, white), and pass-fail results of each examination, specifically showing the comparative performance of blacks, Puerto Ricans and whites.

Appointments shall not be made nor licenses reinstated or issued until three weeks after said report has been received by the Court and by plaintiffs' counsel.

Licenses shall then be issued (or reinstated) on a simultaneous basis to persons who have qualified pursuant to the provisions of Paragraph III (A), (B) or (C) supra.

VII. Reports containing the information specified in Paragraph VI (B) supra shall be submitted by the Board of Examiners to the Court, with copies to plaintiffs' counsel, every four months for so long as the interim system for the selection of supervisory personnel provided for herein operates.

VIII. A Community School Board or the central Board of Education may select and appoint supervisory personnel to positions within their respective jurisdictions, pursuant to Paragraph III hereof, from among any of the groups of persons described in Paragraph III hereof, and nothing contained in this Judgment, or in any law, regulation, by-law, or contract, shall be deemed to requ

any such Community Board or the central Board to give priority to any one such group of persons as against another.

Accordingly, pending the implementation of a new selection system pursuant to Paragraph X hereof, the appointing authority is authorized to fill vacancies either by the assignment of acting personnel, or by the appointment of licensed personnel. Nothing in this Judgment, or in any law, regulation, by-law, or contract, shall be deemed to require that vacancies be filled by licensed personnel. With respect to the assignment of acting personnel during the aforesaid interim period, the appointing authority shall be permitted and authorized to select persons who satisfy the eligibility requirements established by state law and by the Chancellor and the Board of Education of the City of New York, without regard to whether such persons presently hold regular appointments or assignments, supervisory licenses, or have passed supervisory examinations, or any portion thereof, administered in the past.

IX. Within six (6) months of the effective date of this Judgment, the parties shall either agree upon a plan for a permanent system for the selection of supervisors within the New York City School System, or any party shall be free to apply to the Court for modification of the Judgment.

X. Notwithstanding Paragraph IX above, any party may, upon at least 3 weeks' written notice to counsel for all other parties, apply for modification of this Judgment to permit the implementation of a new system for the selection of supervisors in the New York City School System, provided that a detailed description of the new selection system, together with all relevant data

relating to the new selection system and its development, have first been made available to all other parties and an opportunity afforded to such other parties to review such data and to confer with the applicant with a view to resolving any differences that may arise and reaching agreement upon new examination procedures that are to be the subject of such application.

XI. Except insofar as plaintiffs' claims are resolved by the terms of this final judgment, this action against defendant Board of Examiners, its members, and defendant Chancellor, and all other claims asserted therein, is dismissed with prejudice on the merits and without costs.

XII. Plaintiffs and the members of plaintiffs' class are hereby severally and perpetually enjoined from instituting or prosecuting any suit or other proceeding in any Court based upon or for the purpose of enforcing any claim or right or cause of action which is included in or comprehended by any of the claims or causes of action or controversies asserted in the amended complaint in this action, and all claims which might have been asserted against the defendants with respect to or in connection with the actions complained of therein, all of which claims and causes of action are hereby decreed to be compromised, settled and extinguished by virtue of the proceedings in this action and this judgment.

XIII. The entry of this final judgment shall not constitute any determination of wrongdoing or misconduct on the part of any party, but is based solely on the Stipulation of Settlement and the Court's determination that it is fair, adequate and in the best interests of plaintiffs and their class.

XIV. The Court reserves and retains jurisdiction herein for the purpose of entertaining an application for modification of this judgment (pursuant to the provisions of Paragraphs IX and X hereof), for the purpose of considering an application for costs and counsel fees (pursuant to the provisions of Paragraph VII of the Stipulation of Settlement), or otherwise for the construction or enforcement of the final judgment.

XV. There is no just reason for delay and the Clerk of this Court is directed to enter this final judgment, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, against defendant Board of Examiners, its members, and defendant Chancellor of the City School District of the City of New York.

Dated: New York, N.Y.
July 12, 1973.

Walter R. Mansfield, U.S.C.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

- X

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs,

v.

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

70 Civ. 4141 (W.R.M.)

PRELIMINARY INJUNCTION

- X

WHEREAS plaintiffs, defendant Board of Examiners and defendant Chancellor of the City School District of the City of New York, have entered into a Stipulation of Settlement of this action, and

WHEREAS defendant Board of Education, its members, and the Deputy Superintendent of Schools of the City of New York have failed to enter into that Stipulation, and

WHEREAS plaintiffs have moved for a default judgment against defendant Board of Education, its members and the Deputy Superintendent of Schools, and, in the alternative, for a modification of the preliminary injunction entered by this Court on September 20, 1971,

NOW THEREFORE, the Court having considered the papers heretofore submitted in this action relevant to these matters, having held hearings on May 3 and May 10, 1973, having rendered its decision dated and filed May 21, 1973, notice of the proposed Settlement having been given to the members of plaintiffs' class pursuant to this Court's order of June 12, 1973, and a hearing having been held June 28, 1973, at which members of plaintiffs' class had an opportunity to be heard with respect to whether said

Settlement was fair, adequate and in the best interests of plaintiffs and their class, and the Court having rendered its decision dated and filed July 10, 1973, it is hereby ORDERED THAT:

I. The preliminary injunction previously entered in this action, filed September 20, 1971, be and it hereby is modified to require all defendants in this action not bound by the Court's Final Judgment entered this date to adhere to the provisions contained herein pending final determination of the action as to them.

II. Except as provided, permitted and authorized in paragraphs III - X hereof, defendants, their agents, servants, employees and attorneys, and all persons in active concert and participation with them are enjoined and restrained from:

A. Conducting further examinations for supervisory positions in the New York City School System;

B. Processing or grading or in any other way administering examinations for supervisory positions in the New York City School System which have previously been administered; and

C. Promulgating eligible lists or issuing licenses solely on the basis of examinations for supervisory positions in the New York City School System which have previously been administered.

III. Community School Boards within the New York City School System or the central Board of Education (hereinafter referred to as "appointing authorities"), are permitted and authorized to select and appoint supervisory personnel for positions within their respective jurisdictions from among the following persons subject to the provisions of Paragraph VI, infra:

A. Persons whose names appear on Board of Examiners' lists for the positions set forth on Exhibit A hereof, which lists have either been heretofore (1) promulgated or (2) completed but not promulgated or (3) prepared but not completed solely because the Board of Examiners has not completed the required check on eligibility requirements established by the Board of Education* provided, however, that persons on such lists are determined by the Board of Examiners to satisfy said eligibility requirements.

B. Persons who have previously taken and passed a written examination for the supervisory positions under the jurisdiction of the central Board of Education which are set forth in Exhibit B hereof and who, subsequent to the entry of this Judgment, perform to the satisfaction of the Board of Examiners, certain additional job-related tasks.

C. Persons (1) who have been or will be appointed to a supervisory position in the New York City School System on an acting basis to fill a vacancy**, either in accordance with Special Circular No. 30 or in accordance with previously applicable procedures, or in accordance with procedures subsequently developed by the Chancellor or the Board of Education, and (2) who have completed or will complete at least 5 months' service in that position on an acting basis,

---

* Except in the case of the District Supervising Attendance Officer list where training and experience of candidates must be rated.

** For purposes of this Preliminary Injunction the term vacancy shall be defined as it is in Part I of Special Circular No. 30 1972-1973 dated October 25, 1972, of the Chancellor of the Board of Education of the City of New York (a copy of which, hereinafter referred to as "Special Circular No. 30," is Exhibit C hereof).

and (3) who satisfy the eligibility requirements set forth in Part III (A)(1) of Special Circular No. 30 and the requirements of Section 236 of the By-laws of the Board of Education, as determined by the Board of Examiners. Such persons shall be licensed only after their on-the-job performance in that position has been evaluated and examined by the Board of Examiners, in conjunction with the appointing authority and pursuant to criteria developed with the appointing authority, which shall be consistent with the mandate of Part III (B)(3) of Special Circular No. 30, provided, however, that pending implementation of a new selection system pursuant to Paragraphs IX or X hereof, the appointing authority is authorized, in its discretion, to continue the employment of any person who is not licensed pursuant to the aforesaid evaluation and examination on an acting basis so long as the appointing authority considers it appropriate, and such person may apply for re-evaluation and re-examination hereunder provided, however, that there shall be at least a five-month interval between such applications. The evaluation and examination required by this Paragraph III shall be completed within 60 days from the date the Board of Examiners receives the candidate's application.

IV. In the event a person is eligible for licensing under the terms of more than one sub-paragraph of Paragraph III, such person shall be permitted to apply for licensing under all such sub-paragraphs and shall be licensed if he qualifies under any one.

V. Applicants who satisfy the requirements of Paragraph III hereof shall be issued licenses for the particular

position, if they are not already so licensed, and shall thereafter be entitled to all the rights, privileges and perquisites, and be subject to all the laws and regulations attendant thereto.

VI. No appointments shall be made, and no licenses reinstated or issued pursuant to Paragraphs III and V hereof until the Board of Examiners shall have:

A. Completed its evaluation and examination of the on-the-job performance of all acting supervisors who have submitted applications pursuant to Paragraph III(C) hereof within 30 days of the opening date of shcool in the fall of 1973 pursuant to appropriate application procedures which shall be developed by defendant Board of Examiners. Defendant Board of Education shall give appropriate notice to all acting supervisors of their rights to be considered for licensing and appointment pursuant to this Preliminary Injunction and the final Judgment entered this date, and of said application procedures, by the opening date of school in the fall of 1973. Defendant Board of Education shall also make provision for such notification on an ongoing basis to acting supervisors who become eligible subsequently for licensing and appointment pursuant to this Preliminary Injunction and the final Judgment entered this date.

B. Submitted a report to the Court, with copies to plaintiffs' counsel, indicating separately with respect to persons examined pursuant to Paragraphs III(B) and (C) supra,

(1) the number of examinations given;

(2) the type of examinations given;

(3) the number of applicants participating in each type of examination, their race/ethnicit (black, Puerto Rican, white), and pass-fail results of each examination, specifically showin

the comparative performance of blacks, Puerto Ricans and whites.

Appointments shall not be made nor licenses reinstated or issued until three weeks after said report has been received by the Court and by plaintiffs' counsel.

Licenses shall then be issued (or reinstated) on a simultaneous basis to persons who have qualified pursuant to the provisions of Paragraph III(A), (B) or (C) supra.

VII. Reports containing the information specified in Paragraph VI(B) supra shall be submitted by the Board of Examiners to the Court, with copies to plaintiffs' counsel, every four months for so long as the interim system for the selection of supervisory personnel provided for herein operates.

VIII. A Community School Board or the central Board of Education may select and appoint supervisory personnel to positions within their respective jurisdictions pursuant to Paragraph III hereof, from among any of the groups of persons described in Paragraph III hereof, and nothing contained in this Preliminary Injunction or in any law, regulation, by-law, or contract, shall be deemed to require any such Community Board or the central Board to give priority to any one such group of persons as against another.

Accordingly, pending the implementation of a new selection system pursuant to Paragraph X hereof, the appointing authority is authorized to fill vacancies either by the assignment of acting personnel, or by the appointment of licensed personnel. Nothing in this Preliminary Injunction, or in any law, regulation, by-law, or contract, shall be deemed to require that vacancies be filled by licensed personnel. With respect to the assignment of acting personnel during the aforesaid interim period, the

appointing authority shall be permitted and authorized to select persons who satisfy the eligibility requirements established by state law and by the Chancellor and the Board of Education of the City of New York, without regard to whether such persons presently hold regular appointments or assignments, supervisory licenses, or have passed supervisory examinations, or any portion thereof, administered in the past.

IX. Within six (6) months of the effective date of the final Judgment entered against defendant Board of Examiners, its members and defendant Chancellor of the City School District of the City of New York, the parties shall either agree upon a plan for a permanent system for the selection of supervisors within the New York City School System, or any party shall be free to apply to the Court for modification of this Preliminary Injunction.

X. Notwithstanding Paragraph IX above, any party may, upon at least 3 weeks' written notice to counsel for all other parties, apply for modification of this Preliminary Injunction to permit the implementation of a new system for the selection of supervisors in the New York City School System, provided that a detailed description of the new selection system, together with all relevant data relating to the new selection system and its development, have first been made available to all other parties and an opportunity afforded to such other parties to review such data and to confer with the applicant with a view to resolving any differences that may arise and reaching agreement upon new examination procedures that are to be the subject of such application.

Dated: New York, New York
July 12, 1973

Walter R. Mansfield
U.S.C.J.

Exhibit A - Board of Examiners' List
(Printed at p. 141a)

Exhibit B - Examinations in Progress
(Printed at p. 142a)

Exhibit C - Special Circular No. 30, with Attachments
(Printed at pp. 143a-155a)

Affidavit of Saul Z. Cohen
sworn to August 7, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE, LOUIS MERCADO, et al., Plaintiffs, -against- THE BOARD OF EXAMINERS, and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al., Defendants.	Index No. 70 Civ. 4141 (W.R.M.) ANSWERING AFFIDAVIT IN OPPOSITION TO MOTION FOR STAY OF ENFORCEMENT

STATE OF NEW YORK)
: SS:--
COUNTY OF NEW YORK)

SAUL Z. COHEN, being duly sworn, deposes and says:

1. I am an attorney and a partner in the firm of Kaye, Scholer, Fierman, Hays & Handler, attorneys for defendant Board of Examiners. I submit this affidavit in opposition to the motion by Charles Wiener, who is not a party to this action, for a "stay of enforcement of Stipulation of Settlement" -- and presumably of the final judgment (the "Judgment") and preliminary injunction modification order (the "Order") entered July 12, 1973 -- pending his appeal to the Court of Appeals for the Second Circuit from this Court's denial of Wiener's motion to intervene in this action.

2. The Stipulation of Settlement, judgment and order adopt an interim procedure for the appointment and licensing of supervisory personnel in the New York City School System. This interim system is intended to continue only until a new comprehensive system is approved by this

Court and was specifically found by this Court to be "in the best interests of the class and of the public school system as a whole." (Decision dated July 10, 1973, p. 4).

* * *

5. The Court has made it clear that the interim system is to last for only a brief period during which the parties are to "bend every reasonable effort toward formulation of a final plan for a new permanent system . . .". (Opinion dated July 10, 1973). There is no likelihood that this reasonable resolution of a difficult problem, through the creation of an interim procedure, would be upset on appeal even if such an appeal were brought by a proper party. Mr. Wiener is not such a party.

* * *

WHEREFORE, deponent respectfully requests that this motion be denied.

Saul Z Cohen

SWORN to before me this
7th day of August, 1973.

Notary Public.

CONSTANCE VAIRO
NOTARY PUBLIC, State of New York
No. 24-9421950
Qualified in Kings County
Commission Expires March 30, 1974

Transcript of Hearing before Judge Tyler,
dated May 24, 1974

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE, LOUIS C. MERCADO, et. al,

Plaintiffs,

-against-

70 Civ.4141

THE BOARD OF EXAMINERS and THE BOARD OF EDUCATION of the CITY OF NEW YORK,

Defendants.

May 24, 1974
3:30 p.m.

BEFORE: HON. HAROLD R. TYLER, JR.,

District Judge

APPEARANCES:

LEGAL ACTION CENTER OF THE CITY OF NEW YORK
Attorneys for plaintiffs
BY: MRS. ELIZABETH B. DUBOIS, ESQ., and
JEANNE R. SILVER, ESQ., of Counsel

Messrs. KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
Attorneys for Defendant Board of Examiners
BY: SAUL Z. COHEN, ESQ., of Counsel

ADRIAN P. BURKE, ESQ., Corporation Counsel
Attorney for Defendant Board of Education
BY: LEONARD BERNIKOW, Esq.,
Assistant Corporation Counsel

MICHAEL A. REBELL, ESQ.
Attorney for Intervenors

* * *

[page]

MR. COHEN: Some of the people here at the table won't recognize the qords "There's good news tonight," but I

think we are at a point to advise the Court that "There's good news tonight."

THE COURT: Would you.

MR. COHEN: We have been meeting, the Board of Education, the Board of Examiners, the Chancellor's representatives, and representatives of the plaintiffs, and we have a plan which we are prepared to submit to the Court as an agreed proposal for a new selection system for supervisors in the New York City School system.

With three reservations, which I will describe, which we hope will turn out not to be reservations but at the moment are reservations.

Mrs. DuBois, if you object to my characterization, you will have a chance after me.

Part of this proposal calls for the designation of consultants by the Board of Education in one instance and the Board of Examiners in another instance.

The parties have tried to describe ways of agreeing on consultants and we are not successful in describing the manner. Therefore, we left the designation of the consultant ~~planning~~ in this proposal with the belief that when such a consultant is designated, we will find a way that will be acceptable to the parties.

In other words, that the name will be inserted prior

to the signing of this plan. There are still things that have to be done, there will be some time for us to consider this subject and we hope that when the Board of Examiners designates its consultant, that it will be a consultant that will not raise an objection; and if it is, we will have to figure out a way to deal with that problem.

The second area is a question having to do with a position dealing with the status of persons on prior lists as against persons on subsequent lists. I would prefer that Mrs. DuBois describe that. It doesn't appear in the order, but we understand she is going to make a comment on that.

And the third area, because of the date that was set and the difficulty of working out this agreement, we never got to the point of agreeing on reporting requirements. We both agree, and the earlier order provided, that the plaintiffs should have some opportunity to review work that has been done, and that the defendant assumes certain responsibilities to provide that opportunity, but just what it ought to be and how extensive it ought to be, when it ought to be, those things we have not resolved, and we are submitting this plan with that matter still open.

But the other substantive matters have been resolved, and are incorporated in this plan.

I would like to submit the plan to the Court and

ask for its guidance about what the form it would like us to submit the program.

THE COURT: We will consider this, in other words, a draft, but you --

MR. COHEN: I would consider it more than that. I would say it is an agreed plan with the reservations that were articulated on the record.

THE COURT: It's all right. I understand.

MR. COHEN: However, we didn't accompany it with a notice of motion or we didn't accompany it with other --

THE COURT: I don't think that is necessary.

MR. COHEN: We didn't either, but I can formally offer it as the agreed proposed plan of the parties to this proceeding.

THE COURT: I think what we can do, subject to any disagreement from Mrs. DuBois, is we will have the record reflect that our filing this proposed agreed upon plan with the three reservations or open matters which you have described and which Mrs. DuBois will describe, one in particular, with more detail in a moment.

Then I think probably what we will have to do is have a designated hearing date so that we can if we can't resolve those three open matters later on.

And then if we can reach agreement, we will file

an order approving this as the plan. I would assume roughly thatwould be the way you had in mind.

MR. COHEN: I would think we will also have to be mindful, your Honor, of our obligation to give notice to the interested class.

THE COURT: Oh, yes. But, I mean, that's why we will pick a later date among other reasons. I beg your pardon if I overlooked that. I shouldn't have. You are quite right.

MRS. DU BOIS: Your Honor, that is, you can submit it, but I would like to express plaintiff's understanding of the basis on which we are submitting this, because all that disturbed me was your Honor's last characterization of what would follow next. It's plaintiff's position that this is an agreed upon part of an overall package that we would like to agree to. But that that package would have to contain several elements that we consider essential in any settelement. All that disturbed me was that your Honor seemed to imply that those three matters might be separable from this agreement.

THE COURT: No. If I said that, I beg your pardon. They have to be resolved.

MRS. DUBOIS: From our point of view, your Honor, plaintiffs have agreed to that plan to the extent it exists only on the basis of their understanding or hope that we

could reach agreement as to two matters we consider essential.

First, the selection of the consulting firms. Without consulting firms that we agree to, that we feel will be responsible in developing this plan, this plan is not something that we could possibly accept, and I think your Honor will understand that, in that we feel that the plan could be a very good plan but it is completely dependent on the manner in which it is implemented.

THE COURT: No, please don't --

MRS. DuBOIS: I am just trying to say for the record our understanding.

THE COURT: I certainly would agree. Let's start over again.

You know, what would be more helpful from my point of view:

Nothing that has been set forth here is binding you to anything. What I would really like to know is what is the second matter? I've got down the identity and the agreement on the identity of a consulting firm, but then I was told in your hearing that you would explain the second open item.

MRS. DuBOIS: I would like to explain further the second open item, if I could just briefly, the reporting

requirements, because we do feel that those are going to have to be not simply reporting requirements but detailed requirements by reports by to the plaintiffs and to the Court at various stages, and to provide plaintiffs an opportunity to object and the Court an opportunity to approve or disapprove at various stages.

THE COURT: What's the third item?

MRS. DuBOIS: The third, your Honor, is that plaintiffs feel very strongly that the final order must include a guarantee that no preference in filling vacancies in the future be premised on seniority acquired under the old unconstitutional examination system. This is an issue with which you are familiar to some extent in the whole CSA transfer issue.

THE COURT: I thought that issue had been put more or less to rest.

MRS. DuBOIS: We feel it has in the sense of as a matter of law. However, as a matter of agreement, the Board of Education, which has entered into a contract in conflict with the provision we would like to see in the order, the Board of Education refuses to agree in a settlement to such a provision. The Board of Examiners has no position on this issue.

THE COURT: I had rather thought that Judge

Mansfield in particular had made it clear long ago that agreements don't supersede or transcend federal law. And I had thought that that was axiomatic in any event.

MR. BERNIKOW: Your Honor, may I respond to that?

THE COURT: Yes.

MR. BERNIKOW: Firstly, that decision referred to a matter of interpretation of the settlement between the plaintiffs and the Board of Examiners.

And secondly, that applied to the interim procedure.

THE COURT: Well, I know of no rule of federal law that suddenly says that just because it is not one of those things that federal law is not paramount, I don't get you.

MR. BERNIKOW: Well, what we are saying is, your Honor, we would like an opportunity to present our position with regard to the transfer provisions.

THE COURT: All I am observing is that if anyone thinks that just because there's a contract in existence that says one thing, and that one thing is in contravention of federal constitutional law, don't anybody assume in 1974 that the contract is going to prevail -- it isn't.

MR. BERNIKOW: Your Honor, our position is it is not in contravention.

THE COURT: Of course. I understand that. Oh,

well, once again, I didn't mean to start another argument.

The two things are apparently quite different. So let's not worry about it.

MRS. DuBOIS: With respect to this, in order not to have the entire settlement flounder on this point, plaintiffs have agreed that rather than insisting that this provision be part of the settelement, that we would submit this matter as a separate matter for the Court's resolution with the Board of Education free to present to the Court why it feels that such a provision shouldn't be contained in a final order of the Court.

THE COURT: Does that pick up what you are concerned about?

MR. BERNIKOW: Yes, your Honor.

THE COURT: Okay. I thought so..

Am I right in inferring that you would like to have a little more time to see if you couldn't agree on a consulting firm and perhaps agree on the details of a reporting?

MRS. DuBOIS: Yes, your Honor.

THE COURT: How much time do you want?

MRS. DuBOIS: Can I just suggest:

We are going to have to be back, I assume, on June 12th. Anyway, should we set a firm date on that?

THE COURT: Mr. Cohen?

MR. COHEN: All right, your Honor. We are to come back on June 12th.

THE COURT: That's right.

MR. COHEN: So why don't we come back on June 12th and see if we have reached agreement on these items.

THE COURT: That is a little longer than three weeks or two weeks from now.

MR.COHEN: My belief is we can do it perhaps sooner, if it is agreeable to the plaintiffs.

THE COURT: Well, the thing is, we probably should give notification to anybody who wants to be here, and therefore --

MR. COHEN: You're talking about a hearing? I think that would have to come after.

THE COURT: Well, I am talking about a hearing to this extent:

That hopefully, at this next meeting on this particular subject, that there might be some agreement on the consulting firm and the details of the reporting requirements.

The third item I assume there would not be from what Mrs. DuBois just said.

Now, as you say, it could possibly be done earlier than June 12th, but I have no objection to June 12th.

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MR. COHEN: Well, today is the 24th. Next week is a short week. I would be agreeable to do it the end of the following week, on the 7th or the 6th.

MRS. DuBOIS: It seems to me we could call up and make an appointment if we are ready before then.

THE COURT: That's all right. I accept that with alacrity.

MRS. DuBOIS: Your Honor, can I ask, before we set a date for June 12th, if that is the date that the Court report is supposed to be due, should we perhaps set the Court date for the 14th and maybe have a chance to discuss it?

THE COURT: I would think you would like that. Did you hear that?

MR. COHEN: Pardon? I didn't hear it.

THE COURT: Mrs. DuBois suggested that because ofour schedule the report being due on the 12th, that perhaps we ought not to have any kind of a court meeting or conference that day so as to allow everybody a chance to digest the report, whatever it may be.

MR. COHEN: The thing that concerns us is, we are approaching the end of the school year and we would like to be sure that this program in concluded and agreed upon and established before the end of the school year, and to the extent

that we defer this today and if we then find ourselves in need of another referral, we are going to find ourselves backing up against the end of the school year with no time.

That's why I would like to urge that we try to resolve this. These matters out to be resolvable with dispatch, I would think.

THE COURT: Well, I don't know how to reply to that.

MR. COHEN: What is your suggestion?

MRS. DuBOIS: The 14th.

THE COURT: Mrs. DuBois doesn't have any great extension in mind; a couple of days.

MR. COHEN: All right, your Honor. We would be agreeable to the 14th as a date for reporting to this court that we have hopefully resolved these outstanding matters.

THE COURT: All right. Well, I'm going to suggest we put it down for 3:30 that day, with the understanding, or course, that if you like an earlier meeting, and presumably you will, you let me know the day. That is, of course, on the subject of two of these three items, reporting requirements and the consulting firm identification.

Now, does that lead us to Mr. Rebell?

MR. REBELL: Thank you, your Honor.

Your Honor, I would like to preface my substantive

remarks on the motion by informing the Court that the matter, as I discussed in the last few paragraphs of my affidavit, namely, the interest of other community boards, besides District 3, which has formally moved to intervene in this matter, has in recent days come further to the fore.

There was a meeting of the New York City School Boards Association last night, which is the grouping of all the community school boards, where a resolution was passed authorizing me to seek intervention, joining the community board 3 on behalf of the entire association.

I have also been asked by certain other individual community boards to intervene.

So, pending a formal amendment of that motion, I would like to bring to your Honor's attention the fact that wer are not really, in essence, talking only about District 3 here, we are talking about all the community boards in the City attempting to protect their vital interests which are being discussed at this very moment by the plaintiffs and defendants by seeking intervention in this matter.

Now, I will not take the Court's time by going into detail on all the specific items that I have put forth in the papers concerning the obvious interest of the community boards in this matter. They have statutory power to run the schools, they have the statutory power and authority to

appoint supervisors. I think it is obvious that they have a legal interest in the matters before this Court.

I think it is also quite apparent, especially at this stage after the developments of recent weeks, that the interests of the community boards are not being adequately represented by the parties.

I don't believe that Mr. Cohen, for example, who is unwilling to even give us copies of this report that was submitted to your Honor today, can in any way claim that he is speaking in our behalf.

Similarly, the Board of Education, who is supporting the moves of the Board of Examiners, and now the plaintiffs, it has become apparent through the situation that arose two weeks ago, cannot, in essence, represent the interests of the community school boards.

I think the only real issue on this motion, your Honor, is the issue of timeliness and whether our intervention will delay these proceedings.

I would like to very briefly restate the fact that we are not seeking in this motion to intervene for the purpose in any way of opening up the merits in this case or seeking to open up the merits, nor are we seeking to dispute the terms of the final judgment. We are seeking a limited intervention somewhat analogous to the intervention that has already been

granted to the CSA in this matter for the specific purpose of allowing our interests to be protected in this final report on the interim plan and in that permanent plan which is now before you.

And I bring to the Court's attention the fact that although these negotiations have obviously been going on between the plaintiffs and defendants for many months now and has culminated in the document before you, to this date my clients have no knowledge whatsoever of the content of that plan, we have not been served with the document. On specific request this afternoon we were denied it, and I believe that when you were talking about a school system of over a million students, most of whom are under the direct jurisdiction of the community school boards, it is almost unbelievable that all this is going on behind their backs. And the reason we believe that intervention is both appropriate and necessary at this point is that this will permit and expeditiously involve the community board interest in this matter.

If the community boards are not granted full intervention, I think it is apparent that they in any event would seek to be heard at the hearing on this matter.

I believe that without the organized standards that counsel can give them in organizing their representation from counsel, that process itself will cause further delay.

By the time the communications get out to the school boards, the Board of Examiners attempts to explain it to them, they have their differences with the Board of Examiners, the delay will go on and on.

And I believe that the events of the so called resistance of several of the community boards several weeks ago is a clear indication to your Honor that if they are directly represented in this matter by counsel, whatever differences of opinion come up, whatever disagreements there may be, will be brought sharply to the fore, will be resolved and will be dealt with.

As against that, we have the past history of meeting so called consultations, different community boards going their own way, allegations of misinformation and distortions of information, and I believe that what we are seeking to do is in the best interests of expedition of this litigation as well as it is in the direct interests of the community boards themselves.

And I would like to make one final point on this matter. Mrs. DuBoff has indicated that one of the major considerations still pending under this permanent plan is the reporting requirements. There again, it goes beyond next weeks's or next month's hearings on this permanent plan, it goes on to the question of whether we are going to get official

notice and involvement in whatever conferences or proceedings are going to be going on during the many months when this permanent plan is first implemented.

I respectfully submit that without the active cooperation of the community boards, the permanent plan cannot succeed.

And I further respectfully submit that the most efficacious way to get that cooperation and involvement is to have us legitimate parties so that we are immediately served with all the papers, so that we know when the conferences are, so that we can report and know what is going on and present our views directly to the Court and not through the intermediaries of parties who clearly have their own agendas and own interests and who will represent the community boards' interest only to the extent that that is constant to what they believe to be in their own interests.

In short, your Honor, I think it is clear that the community boards have an interest in this matter, that their interests are not being adequately represented by the other parties, and that their intervention, which is timely, it was brought as soon as it became clear that the representation by the other parties was fully inadequate, that this intervention will expedite rather than delay the proceedings herein. Thank you.

THE COURT: This motion is consented to by the parties.

MR. COHEN: Your Honor, speaking for the defendant Board of Examiners, the motion is objected to.

Before I make some oral remarks, your Honor, we only received these papers on Wednesday, I believe. I would like to submit a brief in opposition to the motion, and I would respectfully request from the Court a week from Monday.

THE COURT: A week from Monday?

MR. COHEN: Well, this is a long weekend and that will give us only four days next week.

THE COURT: Let me hear you in opposition, then we will decide any briefs a week from Monday. By that time I was hoping the case would be virtually resolved.

MR. COHEN: First, let me say that the Board of Examiners wants to make it very clear on the record that the opposition of Mr. Rebell, Community Board Number 3, to intervene is not because the Board of Examiners doesn't have concer for the view of that community school board and other community boards. It is very much concerned, has taken many steps to try to incorporate in its plan the views of community school boards.

The question here is whether they have a right to intervene, and in our judgment they don't have such a right and

we are fearful that to grant a right to this community school board to intervene will start an avalanche of intervenors because there are many people who have interests comparable to that of District 3.

I suggest to the Court that being interested in a matter is somewhat different from having a legal interest in the matter.

We appreciate that the community school board is interested in this problem, but they don't have the requisite interest which is the interest required by Rule 24A2, and accordingly shouldn't be granted an opportunity to intervene.

One of the requirements of Rule 24A, Rule 24 in paragraph C, is that the motion shall state the grounds ~~that~~ shall be accompanied by a pleading. We are not objecting on the technical ground that no pleading accompanied Mr. Rebell's papers, but I think it is instructive that none accompanied it because it highlights the fact that it is not a litigable interest to which a pleading could be directed. There is no ~~complaint~~ which could support a complaint, nor is there a defense which would support a defense.

In short, it is not the kind of an interest that the law would recognize as something which someone could intervene in.

So we would like to submit to the Court some case law supporting our contention that there is no interest here which would justify intervention.

Secondly, even if there were an interest which we suggest there is none, even if there were an interest, we think that an interest has been adequately represented; and secondly, that the suggestion that the intervenor come forward at this stage of the proceedings and intervene is something the Court must firmly reject. This case has gone on for four years, during which time many people purported to speak for community school boards.

During the meetings which were being held in negotiating a plan, notices were given to community school boards to send representatives to such meetings, their views were solicited, there is much evidence reflecting the fact that community school boards have had substantial participation in the preparation of this proposed plan, and for them to have sat on the sidelines and now come forward and seek to intervene is, we would think, highly improper and not something the Court should countenance.

in our judgement, it would reatly make it impossible to conclude an agreement on a proposed plan.

~~In~~ district community school boards have a greater interest, for example, than any interested parents

group, which is obviously interested in the quality of the persons eligible to become supervisors? Indeed, why would the community school board have an interest greater than that of teachers organizations, who are the group in which supervisors are drawn? Or why would the community school board have a greater interest than students? The lists would go on ad nauseum, and if everyone of those interested persons were accorded the status of having an interest that is countenanced by Rule 24, we would require Madison Square Garden in order to conduct these negotiations.

THE COURT: Do you want to be heard on this, Mrs. DuBois?

MRS. DuBOIS: Briefly, your Honor.

Plaintiffs don't oppose the motion for limited intervention. We would not oppose it to the extent, as I understand Mr. Rebell indicated, that he's asking only for limited intervention with respect to matters not already settled in this case.

Beyond that I feel I should inform the Court with respect to the sole issue as to whether the community boards' interests are adequately represented by the resisting parties, I think it is absolutely clear that no party other than the plaintiffs have been or are representing the community board interests in any way. The Board of Education, the

Board of Examiners, have fought a community school board role at every stage of this case.

It is true that plaintiffs have tried to limited degrees throughout various stages of this case to represent or to further community school board interests. Because plaintiffs have felt that a non-discriminatory and a job related system required a community school board role.

However, I have to say that it is absolutely clear to me now, as counsel for the plaintiffs, that the interests of the plaintiffs and the interests of the community school boards are not the same and that we are not adequately representing their interests in any way.

I think that it would be a useful thing for the community boards to play a role in the implementation of the final plan which, hopefully, the parties will agree to.

THE COURT: This puzzles me no little. Here we are in an ancient law suit, in which previous orders of this Court have called for community school consultation and input. True, those orders don't define chapter and verse and fine print everything that phrase means, but I am taken a little aback that at this late hour we should suddenly have one community school board coming in, no matter how true what you just said may be. That takes me aback a great deal.

Rule 24 is very plain that applications of this

kind must be timely and they must come at a point where they will not obfuscate or impede or use what's been going on, and I am sick at heart to hear you suddenly say that this would somehow do some good, because I think quite the contrary. I'm shocked to hear that.

You see, I really am troubled. The Court of Appeals has stated flatly, and I agree with them, I have stated flatly, evenbefore they stated flatly, that this is an ancient piece of litigation. Every time I sit down to collect myself in the morning, to open my mail, I get another batch of virulent letters saying that this ought to happen and that ought to happen.

And why, on May 24, 1974, with this kind of a record we suddenly allow one community school board, in a large city like this which has many community school boards, to intervene, I don't understand. I think it would cut at cross purpose everything that has been done.

* * *

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But what input would you expect from the community boards at this late hour?

MRS. DUBOIS: All right. I would expect, your Honor, that in the plan, and particularly the plan when the reporting requirements, etc., are in there, the numerous stages at which, for example, the Board of Examiners is supposed to develop a plan for how it is going to do performance evaluations in the schools, and that's obviously something that ought to be done with the school boards who are concerned with that matter, and of all the questions that have come up now are the kind of questions that will come up in the future.

Hopefully the future system is going to be something that will be developed over time and they're very different from this on the job performance evaluation.

It seems to me that they both can and ought to have input in that procedure in a way the plaintiffs are going to be in no way in the future particularly in a position to want to guarantee.

I mean, the reasons that have compelled plaintiffs in the past to try in various ways to represent the community interests, I just have no reason to believe are going to exist in the future. I don't know what really the plaintiffs class interest is in the future. I have no reason to believe they will have any interest in representing that community board interest.

I also just think, Your Honor, with respect to their legal interest, and I hate being in a position of having to be an advocate for this intervention, but I think it should be pointed out that these continual references as a political footbal, I think the community boards have to be looked at as some form of counterpart to the Board of Education. If the Board of Education was asking to intervene, had it not initially been sued, nobody would think that was outrageous. If you look at the decentralization, it writes in very serious responsibilities for community school boards with respect to selection and appointment of personnel.

THE COURT: I understand that, but I then say, why now? This thing has been going on for so long.

MRS. DuBOIS: Your Honor, I have the same concern. I have no interest in unravelling the progress we have made to date, and I have a very strong interest in not doing that, and I want the plan, the agreement, we have gotten with the defendants to go into effect. All I think is that when that does become operative and we hafe an order, that all we have is a very vague thing for future years and it is going to have to be developed. It wouldn't be over maybe as a case for some period but it wouldn't be over in the sense that there will be a system. There will be no examination system for several years, and it seems to me that in the progress of developing that system it really is a central community board's fair role.

* * *

[page 50]

MR. BERNIKOW: Your Honor, may I raise one point?

THE COURT: Yes.

MR. BERNIKOW: We have talked about three areas of this agreement and we indicated that one area in particular, the area of the transfer provision, and may I ask what the procedure we should follow with regard to that?

THE COURT: Well, don't ask me, because I really don't know. I gathered from Mr. Cohen and Mrs. DuBois that they had in mind we are going to have to really treat that sort of separately.

MR. BERNIKOW: That's right.

THE COURT: Now, they must have something specific in mind.

MRS. DuBOIS: Eventually we are going to hope to have some sort of agreement. That's going to incorporate the agreement and at that time would be the time that we would submit requests for an aspect of the order which the Board of Education would at that time have a chance to possess, but I can't imagine that the Board of Education wouldhave to do anything until that time comes, until there is some submission of order.

THE COURT: Let me suggest something to you that I just went through, and I don't see that it's a necessity, but it may be. It's really what I understand Mrs. Dubois to be saying.

Just a couple of days ago we finally entered a final order on a piece of litigation called Mrs. Bronson versus Consolidated Edison Company, which you may remember deals with utility cut-off of service. And one thing we did there was we entered a final order but we had a hearing just before that in which we resolved a couple of open issues. And the Court wrote a memorandum or opinion, if you will -- we called it an opinion in that case -- and we filed it simultaneously with the final order resolving that.

Now, I assume that, roughly speaking, that might be a device to be used here, and I assume Mrs. DuBois is suggesting substantially the same kind of thing.

MR. BERNIKOW: I would agree with that, your Honor.

THE COURT: Because here I think we would have to have a separate hearing and discussion on that and then if there is a dispute, the Court is going to have to rule upon it. Then we can enter some kind of an order.

MR. BERNIKOW: Okay, your Honor. Thank you very much.

* * *

[Transcript ends on page 52]

Memorandum Decision and Order of
Judge Tyler, dated June 10, 1974

COPY

U.S. DISTRICT COURT
FILED
JUN 11 1974
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SIMON M. CHANCE, LOUIS C. [illegible] MERCADO, et al.,

Plaintiffs,

-against-

THE BOARD OF EXAMINERS and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

MEMORANDUM

70 Civ. 4141 HRT

#40796

TYLER, D.J.

At a point in time when this case is almost four years old and the parties are in the process of resolving a final plan and judgment, Community School Board, District 3, of New York City, later joined by an organization known as the New York City School Boards Association, seeks to intervene, as a matter of right, in this litigation pursuant to Rule 24(a)(2), F.R.Civ.P. Defendants have opposed this

application; plaintiffs have submitted no papers on this motion, but their counsel orally has suggested that, at least as a political matter, they would not object to limited intervention on a permissive basis. For reasons to be summarized hereinafter, this court denies the motion to intervene.

The history of this suit concededly may be read to indicate that the would-be intervenors have a practical interest in this action. Indeed, at one time or another, a goodly number of the thirty-two community school boards of this city have sent communications to counsel and the court in this case. More important, the attorneys for the parties have been in consultation with representatives of the community school boards from time to time as this case has been litigated. This court, in one or more of its orders, has specifically recognized that the community school boards' views should have a place in the parties' considerations of their positions. But all of this is a far cry from establishing that the would-be intervenors can intervene as of right. Neither the New York City School Boards Association, which claims to represent twenty-three of the city's thirty-two community boards, nor District Board No. 3 possesses legal authority under the 1969 state

legislation to prescribe and conduct the examinations which are the subject of this litigation. That power is vested solely in the defendant Board of Examiners. See N. Y. Educ. Law § 2590-j(3)(a)(1).

Also, as I view the matter, there is at least a reasonable doubt that the Association and one community school board in fact or in law can represent the community school boards as a whole. See N. Y. Educ. Law § 2590-e(10). 1/ Furthermore, it may be no more technical oversight or deficiency that the applicants have failed to file, as Rule 24(c) mandates, "...a pleading setting forth the claim or defense for which intervention is sought." For those reasons, therefore, this court cannot find that the intervenors can substantially claim "an interest relating to the property or transaction which is the subject of the action and..." are "...so situated that the disposition of the action may as a

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1/ At oral argument, counsel for the putative intervenors, first suggested that he might represent all of the community boards. In response to the court's direction, however, he submitted an affidavit only by an official of New York City School Boards Association.

practical matter impair or impede [their] ability to protect that interest...." Rule 24(a)(2), F.R.Civ.P. Finally, I note that within the meaning of the concluding phrase of this section of the Rule, the community school boards' interests are "...inadequately represented by existing parties," particularly plaintiffs.

If this court were to regard this application as one seeking permissive intervention pursuant to Rule 24(b), the intervenors are in no better position. As already indicated, in this litigation which has been comparatively well publicized ever since its inception, the intervenors have waited until the eve of what appears to be the final resolution of this case. To say the least, then, their application is untimely. Plaintiffs' counsel suggested at oral argument that intervention by the intervenors on a permissive basis might be politically helpful for implementation of the final plan. Although the position of plaintiffs' counsel is understandable, it is not legally sufficient. Moreover, as the affidavit submitted on behalf of the New York City School Boards Association indicates, it is more than likely that intervention by these organizations at this late date would necessarily create more difficulties and delays for the parties and the court. As is well known, this court

and the Court of Appeals for this circuit have recently acted on a number of occasions that this litigation, important as it may be, is also extremely old and must be brought to a conclusion.

Motion to intervene denied in all respects. It is so ordered.

Dated: June 10, 1974

R. R. Tyler, Jr.
U.S.D.J.

The preceding document is barely legible. We have read the original, and the following is a true typed copy of Judge Tyler's Memorandum Decision. This typed copy is submitted for purposes of clarity.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs,

-against-

THE BOARD OF EXAMINERS and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

----------x

MEMORANDUM

70 Civ.4141HRT

40796

TYLER, D.J.

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one time or another, a goodly number of the thirty-two community school boards of this city have sent communications to counsel and the court in this case. More important, the attorneys for the parties have been in consultation with representatives of the community school boards from time to time as this case has been litigated. This court, in one or more of its orders, has specifically recognized that the community school boards' views should have a place in the parties' considerations of tbeir positions. But all of this is a far cry from establishing that the would-be intervenors can intervene as of right. Neither the New York City School Boards Association, which claims to represent twenty-three of the city's thirty-two community boards, nor District Board No. 3 possesses legal authority under the 1969 state legislation to prescribe and conduct the examinations which are the subject of this litigation. That power is vested solely in the defendant Board of Examiners. See N.Y. Educ. Law § 2590-j3(a)(1).

Also, as I view the matter, there is at least a reasonable doubt that the Association and one community school board in fact or in law can represent the community school boards as a whole. See N.Y. Educ. Law § 2590-e(10).[1/] Furthermore, it may be no mere technical oversight or deficiency that the

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1/ At oral argument, counsel for the putative intervenors, first suggested that he might represent all of the community boards. In response to the court's direction, however, he submitted an affidavit only by an official of New York City School Boards Association.

applicants have failed to file, as Rule 24(c) mandates,"...a pleading setting forth the claim or defense for which intervention is sought." For these reasons, therefore, this court cannot find that the intervenors can substantially claim "an interest relating to the property or transaction which is the subject of the action and..." are"...so situated that the dispostion of the action may as a practical matter impair or impede [their] ability to protect that interest...." Rule 24(a)(2), F.R.Civ.P. Finally, I note that within the meaning of the concluding phrase of this section of the Rule, the community school boards' interests are"...adequately represented by existing parties," particularly plaintiffs.

If this court were to regard this application as one seeking permissive intervention pursuant to Rule 24(b), the intervenors are in no better position. As already indicated, in this litigation which has been comparatively well publicized ever since its inception, the intervenors have waited until the eve of what appears to be the final resolution of this case. To say the least, then, their application is untimely. Plaintiffs' counsel suggested at oral argument that intervention by the intervenors on a permissive basis might be politically helpful for implementation of the final plan. Although the position of plaintiffs' counsel is understandable, it is not legally sufficient. Moreover, as the affidavit submitted on behalf of the New York City School Boards

Association indicates, it is more than likely that intervention by these organizations at this late date would necessarily create more difficulties and delays for the parties and the court. As is well known,this court and the Court of Appeals for this circuit have recently noted on a number of occasions that this litigation, important as it may be, is also extremely old and must be brought to a conclusion.

Motion to intervene denied in all respects. It is so ordered.

Dated: June 10, 1974

s/ H.R. TYLER, Jr.
U.S.D.J.

Defendants' Notice of Motion dated December 20, 1974, together with supporting affidavit of Murray Rockowitz (plus exhibit), sworn to December 20, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

BOSTON M. CHANCE, et al., :

Plaintiffs, :

-against- :

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, :

Defendants. :

----------x

NOTICE OF MOTION

70 Civ. 4141

(H.R.T.)

S I R S :

PLEASE TAKE NOTICE that, upon the annexed affidavit of Murray Rockowitz, sworn to December 20, 1974, and upon the pleadings and all other papers and proceedings had herein, and pursuant to paragraph IX of the Final Judgment on consent herein entered July 12, 1973 against defendant Board of Examiners and the Order herein entered July 12, 1973 modifying the preliminary injunction against defendant Board of Education (hereinafter collectively the "July 12, 1973 Judgment and Order"), and pursuant to the direction of the Hon. Harold R. Tyler, Jr. at the hearings held herein on December 6 and 17, 1974, defendants Board of Examiners and Board of Education will move this Court, at the United States Courthouse, Foley Square, New York, New York, on January 14, 1975, at 4 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, for an order:

(a) Modifying said July 12, 1973 Final Judgment and Order in order to permit the development of examinations for supervisory positions, and thereafter, the administration of such examinations and the promulgation

of lists, issuance of licenses, and making of appointments based upon such examinations, in accordance with the Plan for a comprehensive system for the selection of supervisors within the New York City School System (Exhibit A to the Rockowitz affidavit) initially submitted to this Court on May 24, 1974 as the "Joint Plan" of all parties herein as subsequently modified in the ways described in the Rockowitz affidavit; and

(b) Granting such other, further and different relief as this Court may deem just and proper.

Dated: New York, New York
December 20, 1974

Yours, etc.,

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
Attorneys for Defendant
Board of Examiners

By _____
A Member of the Firm

425 Park Avenue
New York, New York 10022
PL 9-8400

ADRIAN BURKE, ESQ.
Corporation Counsel of the
City of New York
Attorney for Defendant
Board of Education

By _____
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Assistant Corporation
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230 Park Avenue
New York, New York 10017

Attorneys for New York City School Board
Association

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -X

BOSTON M. CHANCE, et al.,

Plaintiffs,

- against -

THE BOARD OF EXAMINERS, AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

- - - - - - - - - - - - - - - - - - - -X

AFFIDAVIT

70 Civ. 4141

(H.R.T.)

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

MURRAY ROCKOWITZ, being duly sworn, deposes and says:

1. I am Chairman of the Board of Examiners of the Board of Education of the City of New York, and am one of the defendants herein. I submit this affidavit in support of defendants' motion for a modification of the Final Judgment on consent entered July 12, 1973 against defendant Board of Examiners and the Order entered July 12, 1973 modifying the preliminary injunction against defendant Board of Education (hereinafter collectively the "July 12, 1973 Judgment and Order").

2. Defendants are applying for an order modifying the aforesaid July 12, 1973 Judgment and Order, pursuant to the express provisions of paragraphs IX of those orders, and pursuant to the direction of this Court at the

hearings held on December 6 and 17, 1974. The modification requested would permit the Board of Examiners to fulfill its statutory responsibilities to develop and administer examinations for supervisory licenses within the New York City School System. The Board of Examiners would develop and administer such examinations pursuant to a Plan which was initially submitted to this Court at the May 24, 1974 hearing as the "joint plan" of all parties herein. (A copy of the Plan, with the additions and modifications described below, is annexed as Exhibit A hereto.)

3. When that "joint plan" was submitted, blanks were left for the names of consulting firms to be designated by the Board of Education with regard to the preparation of prototype job analyses (see page 6 of Exhibit A) and to be designated by the Board of Examiners to design and conduct validation studies for certain prototype examinations (see page 22 of Exhibit A). The Board of Education has since designated the American Institutes for Research (AIR), 3301 New Mexico Avenue N.W., Washington, D. C. 20016, to prepare the prototype job analyses, and AIR's name is now set forth on page 6 of the Plan. The Board of Examiners has since designated Development Dimensions, Inc., Suite 419, 250 Mount Lebanon Boulevard, Pittsburgh, Pennsylvania 15234, to design and conduct validation studies for certain prototype examinations, and its name is now set forth on page 22 of the Plan.

4. In addition, when the Plan was originally submitted to the Court on May 24, 1974, it contained the following language with regard to "reporting requirements":

"V. Reporting Requirements

> The parties are agreed that procedures for regular reporting to plaintiffs and the Court regarding implementation of the plan proposed in the memorandum are essential and should be included in an order of the Court. The parties are now in the process of drafting a detailed reporting requirement section which will both define and limit defendants' reporting obligations, as well as plaintiffs' opportunity to object to any failure to comply with applicable provisions of law or the Court's order."

Unfortunately, despite substantial efforts, the parties have been unable to reach agreement with regard to reporting requirements. However, defendants -- i.e. the Board of Education and the Board of Examiners -- have agreed between themselves on detailed reporting requirements whereby the Court and plaintiffs will be kept fully informed as to the development of each stage of the three prototype examinations described in the Plan which are to be developed and administered pursuant to that Plan. These reporting requirements are set forth as paragraph V of the Plan (Exhibit A hereto).

5. The Plan will establish new procedures in a comprehensive supervisory examination system. Basically, the Plan calls for a two-step process of "open-qualifying" job-related examinations for each candidate for a supervisory position. Step 1 will consist of a "comprehensive assessment program" whereby the candidate's capacity to perform significent job requirements will be examined. A variety of tests will be used. (See Part II of the Plan.)

The job requirements will be determined as a result of job analyses which shall be developed for each supervisory position (See Part I of the Plan). Except for those candidates who fail to meet minimum levels of acceptable performance, the results of the Step 1 examinations will be scored and reported to the Central Board of Education, or the Community School Boards, whichever has jurisdiction with regard to a particular position. Instead of a composite grade, a profile of the successful applicant's performance in each test administered will be presented. This will enable Community School Boards to place emphasis in the selection of applicants on those job requirements which the Board deems most important. (See Part IIB of the Plan.) Those applicants who qualify under the Step 1 Examinations shall be declared eligible for provisional appointment to the supervisory position in question by a board of education having jurisdiction (i.e., the central Board of Education or a Community School Board). (See Part IV of the Plan.) Thereafter, the Step 2 test, an evaluation of a provisional appointee's performance on the job after one year of service in the particular position will be administered. (See Part IIE of the Plan.) Those who are rated satisfactory as a result of the Step 2 examination shall receive a permanent license for that position. (See Part IV of the Plan.)

The Plan also contains provisions governing the frequency of the Step 1 examinations (Part IIC of the Plan); the phasing out of the Interim Examination System presently

contained in paragraph III of the July 12, 1973 Judgment and Order (Part IID of the Plan); the selection, background and training of examination assistants and assistant examiners (Part IIF of the Plan); the right of appeal and procedures governing appeals, by applicants from Step 1 and Step 2 findings (Part IIG of the Plan); validation procedures (Part III of the Plan); and reporting procedures (Part V of the Plan).

6. As the Court is fully aware, the annexed Plan was developed by defendants jointly with plaintiffs after literally hundreds of hours of meetings, and after consultations with a number of experts who formed a Task Force to bring together expertise in a variety of areas. While defendants have been unable to reach an agreement with plaintiffs with regard to the identities of consultants and reporting procedures, defendants have retained all other aspects of the Plan which plaintiffs and defendants jointly submitted to the Court on May 24, 1974.*

7. Defendants respectfully submit that the annexed Plan for a new comprehensive system for the selection of supervisors within the New York City School

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* Other than the modifications in the "joint plan" described above with respect to consultants and reporting, not one word in the "joint plan" originally submitted to the Court on May 24, 1974 has been changed in any way. Of course, since plaintiffs are not jointly moving the adoption of the Plan, defendants recognize that certain minor language changes will be required in the Plan when it is finally approved. In addition, defendants reserve the right to make substantive changes in the Plan if plaintiffs indicate that they intend to oppose the previously agreed upon aspects of the Plan.

Syston is not only consistent with, but by far surpasses, the requirements of governing law for examinations.

Murray Rockowitz

Sworn to before me this
20th day of December, 1974.

Mary M. Curran
Notary Public

MARY M. CURRAN
Commissioner of Deeds, City of New York
Kings County Clerk - No. 2-2231
Commission Expires July 1, 1975

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BOSTON M. CHANCE, LOUIS C. MERCADO, et al., Plaintiffs-Appellees, -against- THE BOARD OF EXAMINERS, Defendant-Appellant, -and- THE BOARD OF EDUCATION OF THE CITY OF NEW YORK AND THE CHANCELLOR OF THE CITY SCHOOL DISTRICT, Defendants-Appellees.	AFFIDAVIT OF SERVICE Docket No. 76-7348

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOHN McWALTERS, being duly sworn, deposes and says that he is an employee of Kaye, Scholer, Fierman, Hays & Handler, is over the age of eighteen years and is not a party to this action.

On September 30, 1976 he served true copies of the annexed Joint Appendix, consisting of five volumes designated Volume I, Part A, Volume I, Part B, Volume I, Part C, Volume II and Volume III - Exhibits, on each of the following attorneys at the indicated address:

W. Bernard Richland
Corporation Counsel of the City of New York
Attorney for Defendants-Appellees
Board of Education and Chancellor of the
City School District
Municipal Building
New York, New York 10007

-and-

Elizabeth B. DuBois, Esq.
Attorney for Plaintiffs-Appellees
271 Madison Avenue
Suite 708
New York, New York 10016

by personally delivering said copy to each of the above at the indicated addresses and leaving same with a person of suitable age and discretion in charge of the office at each address.

John McWalters

John McWalters

Sworn to before me this

30 day of September, 1976.

Richard J. Hallora

Notary Public

RICHARD J. HALLORAN
Notary Public, State of New York
No. 60-4618503
Qualified in Westchester County
Certificate filed in New York County
Commission Expires March 30, 1977